INDEX.

Statement of pleadings and decrees..... 2- 5

The stranding 5- 9

Depth of water where vessel was stranded..... 10-11

As to the sand banking about the Elfrida, or her settling, or becoming imbedded therein..... 11-13

Circumstances under which the contract was made, and which show that it was a fair and reasonable one under the existing conditions and probabilities..... 13-28

The situation of the Elfrida, her peril, present and probable, the shore where she was stranded, the exposure to winds and seas, and the experience of other vessels were such as to justify the apprehensions of the master, which he cabled to the owners..... 28-31

As to the experience of other stranded vessels..... 31-36

As to the preparations made by salvors, the nature and value of their plant and appliances, and the work done and risk incurred by them..... 37-40

Value of the Elfrida..... 40-42

Assignment of Errors..... 42-44

POINTS AND ARGUMENT, TO WIT:

When a salvage contract has been fairly entered into and the salvor has not taken advantage of his power to make an unreasonable and inequitable bargain, the fact that the compensation may be deemed excessive, on account of the work having been performed in less time and with less trouble and expense than was expected, will not justify setting it aside, as the parties had the right and were presumed to take into consideration all the elements of uncertainty and the interests at stake in making the contract 44-62

Was the amount agreed to be paid so excessive as to be unreasonable and inequitable?..... 63-65

Was any undue advantage taken of the master?..... 65-66

Was the vessel in danger of loss or serious injury?..... 66-70

The inquiry is not what the court should have awarded in the absence of a specific agreement, but whether any sufficient reasons have been advanced to justify the violation of that agreement, and to hold it to have been unreasonable and unconscionable, under all the circumstances.. 70-72

There was a substantial compliance with the contract, in all its terms, and its object was promptly and skillfully accomplished by libellants..... 73

The amount decreed in the trial court will not be reduced, even when there is no contract, unless for clear and palpable mistake, or gross over-allowance, none of which existed in this case..... 74-77

The burden of proof, under the decision in the Agnes I. Grace, *sup.*, and other cases, which we have cited, was upon appellants..... 77

The charges of collusion between competing salvors is refuted by the evidence, and can not affect the nature and value of the services, or the merits of the contract..... 77-79

Brief General Review..... 79-91

No. 60.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1898.

CHARLES CLARKE AND ROBERT P. CLARKE,
LIBELLANTS AND PETITIONERS,

VS.

STEAMSHIP ELFRIDA; PYMAN, BELL & CO.,
CLAIMANTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LIBELLANTS.

STATEMENT.

Libellants, Charles Clarke and Robert P. Clarke, composing the firm of Charles Clarke & Co., of Galveston, Texas, on October 24, 1894, filed their libel in the United States District Court for the Eastern District of Texas, against the steamship Elfrida, to recover the sum of $22,000, with interest and costs, claimed to be due them for services rendered in the performance of a contract with the master, and which was in these words:

"THE STATE OF TEXAS,
"County of Brazoria.

"This agreement, made and entered into this 15th day of October, 1894, between the steamship Elfrida, and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part,

"Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. Elfrida, which is now stranded west of and near to the west jetty at the mouth of the Brazos river, in said County and State; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

"The said party of the first part agrees to pay to the said party of the second part for such services, i. e., when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part,

however, reserving the right to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto that should he fail to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit, 21 days from date hereof, the said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools or appliances furnished.

"Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safety. It is also agreed and understood that the use of the crew and engine shall be at the use and disposal of said party.

"Witness the hand of B. Burgess, master of the steamship Elfrida, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

"BENJ. BURGESS.
"CHARLES CLARKE & CO."

"Witness:
"M. P. MORRISSEY,
"J. H. DURKIE,
"Master S. S. Lizzie, of Whitby." (Tr., 25, 31.)

Amended pleadings were filed by both sides. The principal averments of the answer were, in substance, that the agreement was signed by the master under a mutual mistake of fact, or by mistake on his part, which libellants took advantage of, as to the danger in which the vessel was, and that it was improvidently made for an excessive compensation without a proper understanding by him of the vessel's alleged freedom from danger. That the master had been prevented from carrying out his instructions

to accept a tender made, if lower impossible, by information of the cable being conveyed to the salvors before the master saw it. That the parties were not upon an equal footing. That libellants made an unreasonable bargain with the master by reason of the stress of the situation and that of his vessel, and acted collusively with other salvors in obtaining from him the agreement.

That libellants had not removed the steamship from the beach by the means they had contracted to use, but had also used the ship's winches and tackle contrary to the agreement.

Libellants replied, specifically denying the matters stated as grounds for annulling the contract, and gave in detail the facts preceding and attending the execution and fulfillment of the contract. (Tr., 8 to 23.)

The references which we shall make to the evidence upon both sides render unnecessary a further recital of the allegations.

The District Court entered its final decree in favor of libellants October 29, 1895, awarding them $22,000, the amount stipulated to be paid by the contract, with interest and costs. The court found from the evidence "that the services rendered by the libellants in saving the steamship Elfrida, her tackle, apparel and furniture, were and are salvage services and are entitled to be paid for and compensated as and for salvage services"

The decree proceeds:

"The court further finds from the evidence that the said salvage services were rendered by the libellants in saving the said steamship, her tackle, etc., under a contract in writing, made between the libellants and Benjamin Burgess, the master of said steamship Elfrida, in possession of said steamship at the time, and as such master was duly authorized to make the same; and the court further finds from the evidence that said contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the

said master and of the owners of said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions." (254.)

Claimants appealed to the Honorable Circuit Court of Appeals for the Fifth Circuit, which on November 17, 1896, reversed the decree of the District Court and remanded the cause, with instructions to that court to enter a decree in favor of libellants and against claimants and their sureties for the sum of $10,000, with interest at six per cent per annum from the date of filing the original libel, and for costs of the District Court and the costs of the appeal were adjudged against libellants. (260.)

On December 7, 1896, a petition for rehearing was filed in the Circuit Court of Appeals and was by it denied on January 25, 1897. (261-2-3.) Thereupon libellants applied to this court for a writ of certiorari to the Circuit Court of Appeals, requiring the whole record to be removed into the Supreme Court, which application was filed and granted in February, 1897, to all of which proceedings reference is made.

The evidence relating to the more important subjects has been compiled by us under the proper heads and is here presented.

THE STRANDING.

On October 5, 1895, the British steamship Elfrida, of 1454 tons net register, 290 feet long, 38 feet in breadth, 20.1 feet in depth and drawing 11 feet, 10 inches, was crossing the bar at the mouth of the Brazos river on the coast of Texas bound for Velasco, a few miles up the river. The United States government had extended jetties from the right and left banks of the river out into the Gulf, the outer end of these jetties for a distance of two thousand feet or more being submerged. The heel of the ship touched, there being but five inches between the bottom and the bar, and

an easterly wind swung her bow against the west jetty. (147, 82, 237.)

The steamer's log records these and other more material details clearly and briefly, and that part of it that relates to the stranding, condition of the ship and the salvage is here given: (245.)

"Friday, October 5th, 1894.

"0.45 a. m. hove up anchor and proceeded, pilot on board.

"1.15 p. m. ship grounded inside Velasco breakwaters, there being a strong wind and sea on ship's broadside, her bow drifted alongside the breakwaters; we then run out a kedge from starboard bow and hove taught with windlass, engines going full speed astern, but could not move the ship; wind and sea still increasing.

"5.00 p. m. run the kedge anchor out again and made another effort to float the ship, but was unable to do so, ship having drifted further on the breakwater.

"7.30 p. m. Tide falling, and there being too much sea on to run out another kedge, we finished with the engines for the night.

"Midnight, wind and sea still increasing, ship straining and bumping heavily.

"Saturday, October 6th, 1894.

"6.0 a. m. weather slightly moderating.

"6.30 a. m. made another attempt to float the ship, but without any success.

"11.0 a. m. wind and sea moderating, tug boat run out starboard bow anchor and 50 fathoms of cable by a six inch hawser which was badly strained and broken, likewise one coil of 3¼ inch manilla rope was badly strained; we then hove cable taut and waited until high water.

"At about 8 p. m., the ~~weather~~ water then being at its highest, we hove up on the anchor and worked engines according to judgment;

after pumping on number three tank for some time, ship drifted over breakwater and grounded on the other side; we then let go the port anchor to prevent her from drifting further on to the shore.

"9.30 p. m. Tide falling; finished with the engines for the night.

"10.0 p. m. run out stream anchor (10 lwt.) and 2½ inch wire attached from starboard quarter.

"Midnight, wind and sea increasing.

Sunday, October 7th, 1894.

"About 2.0 a. m. very strong N. E. wind and high sea; cable chain parted and ship drifted further on to the beach. The wire rope aft parted likewise and all were lost.

"8.0 a. m. Wind and sea moderating.

"P. M. Wind and sea still moderating.

Monday, October 8th, 1894.

"A. M. Wind moderating. Crew variously employed.

"P. M. Weather fine and sea smooth.

~~*Monday, October 8th, 1894.*~~

"~~A. M. Wind moderating. Crew variously employed~~.

"~~P. M. Weather fine and sea smooth~~.

Tuesday, October 9th, 1894.

"A. M. Wind light and weather fine. Crew variously employed.

"P. M. Moderate S. W. Breeze and fine weather.

Wednesday, October 10th, 1894.

"A. M. Very strong southerly gale and high sea, ship straining and bumping heavily.

"P. M. Wind and weather the same.

Thursday, October 11th, 1894.

"A. M. Strong wind and heavy sea. Crew variously employed.

"P. M. Wind and weather the same.

Friday, October 12th, 1894.

"A. M. Strong wind and heavy sea. Crew variously employed.

"P. M. Wind and weather the same.

Saturday, October 13th, 1894.

"A. M. Moderate easterly breeze. Crew variously employed.

"P. M. Wind and weather the same.

Sunday, October 14th, 1894.

"A. M. Very strong S. E. gale and very high sea; ship fast on the ground.

"P. M. Wind and weather the same.

Monday, October 15th, 1894.

"A. M. Very strong S. E. gale and very high sea; ship still fast on ground.

"P. M. Wind and weather the same.

Tuesday, October 16th, 1894.

"A. M. Wind and weather moderating. Crew assisting to run anchors out from aft, in order to get the ship afloat.

"P. M. Moderate breeze and fine weather.

Wednesday, October 17th, 1894.

"A. M. Weather very fine. This day salvors engaged trying to float ship, they heaving on anchors, with tugboat astern, engines working likewise.

"At about 7:30 p. m. vessel afloat and proceeded to sea to await daylight to enter. Crew employed assisting salvors, etc.

Thursday, October 18th, 1894.

"7.0 a. m. Arrived and moored alongside of river bank at Quintana to be surveyed. Salvors picking up anchors, which were used to get ship off. Vessel's winches, windlass, cable, likewise ropes were badly strained and damaged; size of ropes 2.6 inch, manila, 3 coils 3½ inch manila.

One stream anchor with 2½ inch wire attached and one bow anchor with 15 fathoms cable were lost, salvors being unable to recover them. On examining small boat, we found that it had been badly strained, and leaking; caused by running out kedge anchors.

Friday, October 19th, 1894.

"A. M. Weather very fine.

"Surveyors surveyed ship, going through all tanks, bilges, peaks, etc.,reporting indentations at various parts of bottom of tanks, where cement was broken. On close examination of the steam steering gear, we found that it had been badly strained; it working very badly, probably by rudder working on sand.

Saturday, October 20th, 1894.

"A. M. Weather very fine.

"Divers engaged in examining ship's bottom, outside under water, they reporting everything all right with the exception of a few slight indentations.

"Had engine turned, and found that propeller had pieces broken off four blades." (219 et seq.)

DEPTH OF WATER WHERE VESSEL WAS STRANDED.

This varied with the tides. (63, 120, 238.)

Elfrida drew 11 feet, 10 inches. (Coveney, 90; Burgess, 237.)

The pilot, A. Coveney, a witness for claimants, was asked:

Q. "What water was there around her where she was stranded before they began to move her?"

A. "Seven feet and 9 inches aft. I sounded it at the time. On top or high water it was a 3.2 tide."

Q. "Had you taken any soundings when you were there during the time before you went ashore?"

A. "Yes; Capt. Brock, Capt. Burgess and myself."

Q. "What was the water then?"

A. "About four feet forward."

Q. "Tell us the result of your own soundings, the depth of water around her on the 9th."

A. "About 4 feet right forward, and there was about 6 feet aft."

Q. "That was with the ballast in?"

A. "Yes, sir."

Q. "At what water?"

A. "I could not tell you what the tide guage was at that time, but I know it was not as high as it was when she came off." (86.)

"The steamer's draft when libellants began to move her was 9 feet 6 inches aft and 9 feet forward." (Coveney, 87-89.)

At the time she was taken off the tide was much higher than usual. (Ib., 89.)

It is true that the tide gauge at Galveston Bar, forty miles distant, recorded, on October 17th, 2.6 feet (120), but Lieutenant Judson testified that the difference in the winds between Galveston and Velasco, forty miles away, would make a difference in the tides at the two places, and that no gauge was kept at Velasco.

M. P. Morrissey, called by libellants, testified (52) that the tide

was unusually high in the river at Velasco, about four miles from the mouth, the day the ship was taken off.

Burgess, captain of the vessel and claimants' witness, testified that after she was stranded the water was 6 feet deep at the stem and 8 at the stern (238) and that by pumping out her ballast he could reduce her draft from 11½ feet to 9½ feet, which he did before the salvors commenced work. (207-8.)

Peter Scott, the first mate, also called by claimants, testified that the draft of the vessel was about 12 feet, and that where she was beached was about 9 feet at high water just directly astern. That he wrote up the log every day. (227.)

J. C. Charleson, second mate of the Elfrida, deposed that the vessel was lying in 8 or 8½ feet of water, about 200 feet from the beach. (234-5.)

AS TO THE SAND BANKING ABOUT THE ELFRIDA, OR HER SETTLING, OR BECOMING IMBEDDED THEREIN.

Upon this point we quote from Mr. Coveney, the pilot, and claimants' witness:

Q. "How much farther did she go in (after crossing the jetty)?"

A. "About 600 feet."

Q. "Did she change her position from that time till she was got off?"

A. "She was working in the sand; where the vessel went the sand would give way and she would settle." (84.)

Q. "Did you see any signs of sand banking about her?"

A. "Yes, under the bluff of the bow."

Q. "Alongside the stern?"

A. "Right under the bluff of the bow it had banked. The vessel was certainly settling in the sand." (87.)

This was the only banking he knew of, but he was way from the ship from the 9th to the 17th, when she was floated. (84.)

Q. "If the wind had changed to the southeast, would there have been danger of the sand banking?"

A. "Probably not from the southeast, because it was right in line with the ship, but if it had gone to the southwest it would have banked probably, or thrown the vessel broadside on the beach."

Q. "What then about the difficulty of getting her off?"

A. "She might have bilged." (88.)

Q. "You speak of her settling in the sand with the sand banking on the bluff of her bow, and that she was settling in the sand her entire length. How deep did she settle in the sand?"

A. "About two feet, maybe." (89.)

The ship's log shows that on October 10th there was a strong southerly gale and high sea, and the ship strained and bumped heavily. The weather moderated, but on the 14th a southwest gale came up and very high sea, "ship fast on the ground."

On the 15th a like wind and sea, "ship still fast on the ground." It is thus evident that either the ship had settled, or the sand had formed about her, or she had been driven higher up since October 10th. Otherwise, she would have continued in rough weather to have strained and bumped as she did on the 10th. (247.)

This log, as the ship's daily record, made before any salvage or litigation, and kept by the first officer in the line of his duty, is entitled to the highest consideration. It can not be easily sworn away.

The witness, Morrissey, who was agent of the charterers, was asked if there was any change in the position of the vessel on October 11th, the day Mr. Langbehn, one of the charterers, was there.

A. "No. The only time I heard was when the captain told me

he had been working with anchors and that she had gotten higher up."

Q. "Did you hear talk of sand banking?"

A. "Yes, sir."

Q. "From whom?"

A. "The captain."

Q. "Did he say whereabouts?"

A. "He did not go into details."

Q. "Was there any talk between you and the captain with reference to the increased cost of moving the vessel in case the sand banked?"

A. "I think there was. I told him the more sand banked up the more it would cost to get her off." (65.)

In another place will be found a further summary of the evidence as to the nature of the sand, the likelihood of the vessel settling deeper in the sand, or a bank drifting about her. We do not give it here, as it is probably more germane to the topic under which it is hereinafter collated.

CIRCUMSTANCES UNDER WHICH THE CONTRACT WAS MADE, AND WHICH SHOW THAT IT WAS A FAIR AND REASONABLE ONE UNDER THE EXISTING CONDITIONS AND PROBABILITIES.

The correspondence by cable shows that the owners of the Elfrida were apprised of her condition and of the tenders solicited and made for floating her; that they regarded the same as excessive and caused Lloyds' to communicate directly with their agent, who was upon the ground and acquainted with the situation, and advised acceptance of the lowest bid. All of these messages that appear to be in the least material are here set out. From these, as well as from the letter from the master, dated October 7, and

that from Moller & Co., dated October 9, both of which claimants received in due course of mail, about nine days, as we think the deposition of claimant Bell practically admits (151), it is clearly shown that claimants must have known the situation of the vessel; that she was low to the shore, not injured, or very slightly so, as well as the probable dangers to which she was exposed; and yet, if, as they now say, they did not consider her in any special danger, and regarded the contract as excessive (as they had wired), why did they not, with the full information they had, certainly conveyed by the letters, if not by the messages, at once disaffirm the contract? The answer is that they wanted to wait until the ship had been taken off a lee shore and then repudiate their agreement and contend for à reduced recompense. They should not be allowed to thus break faith and play fast and loose.

(Cable from Burgess, 157, 191.)

"Velasco, Texas, October 7, 1894.

"Pyman, Newcastle:

"Sinecure (1), Friday scandal (2), signally (3), synoptic (4), artillery (5)."

(Translation): 1. The ship grounded at the entrance of the harbor Friday. 2. She is fast head and stern. 3. The ship is in a critical position. 4. Have sent for assistance. 5. The ship was in charge of a Government pilot.

"Galveston, October 8, 1894.

"Pyman, Newcastle:

"Elfrida stranded, Velasco breakwater, menterie (1), invertebre (2), kreosote (3), ivican (4).

"MOLLER."

(Translation): Elfrida stranded. Velasco breakwater. 1. She is beached. 2. She is not out of danger yet. 3. Assistance has been sent. 4. She still continues tight. (150, 163.)

"Velasco, Texas, October 8, 1894.

"Pyman, Newcastle:

"Vessel same position. Lloyds' agent not arrived.

(158.) "ELFRIDA, BURGESS."

(Cable sent by Pyman, Bell & Co.)

"Newcastle, October 9, 1894.

"Steamer Elfrida, Velasco:

"Gladdening (1), speaker (2), surgeon (3), sexton (4), governing (5)."

(Translation): 1. How are matters progressing? 2. What are the probabilities of the ship getting off? 3. Is the ship much damaged? 4. What is the nature of the ground where the ship struck? 5. Keep us fully informed. (161.)

"Velasco, October 9, 7:30 p. m.

"Pyman, Newcastle:

"Lloyds' agent here, (1) serpent, put ship Galveston, including diver, lowest bid forty-five eighty pounds, Lloyds' and myself recommend acceptance; vessel easy, bottom sandy. One thousand feet from deep water.

"BURGESS, ELFRIDA."

Translation of above code word "serpent": Advertised for tenders to get the ship afloat on the principle of "no cure, no pay" (158, 218.)

(From Pyman.)

Newcastle, October 10, 1894.

"Burgess, Steamer Elfrida, Velasco:

"Don't act without our instructions; Lloyds' underwriters communicating direct as consider tender excessive; try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges." (162, 185.)

The following cablegram was from Lloyds' agent of Galveston, but then at Velasco examining into the stranding, and advising with the master:

Velasco, October 9, 7.20 p. m.

"Lloyds', London:

"Elfrida lies easy 1000 feet from deep water. Master and I have two proposals to float ship and place in Galveston. No success, no pay. Lowest bid, £4,580. Recommend acceptance. Waiting answer here.

(186.) "SORLEY."

"Velasco, October 11, 4.4 p.

"Pyman, Newcastle:

"Delay will cause danger of sand banking; also increasing cost of floating.

(158, 190.) "ELFRIDA, BURGESS."

In obedience to instructions in cable of October 9, to keep owners informed, the master further reported on October 12:

"Velasco, October 12.

"Pyman, Newcastle:

"Fresh breeze blowing; rough sea; vessel laying easy; making no water; afraid of sand banking up.

(158, 149, 190, 218.) "ELFRIDA, BURGESS."

Claimants upon the same day sent the following cablegram:

"Newcastle, October 12, 1894.

"Burgess, Steamer Elfrida, Velasco:

"Accept tender forty-five eighty if lower impossible. No cure, no pay. Try include in agreement if steamer after coming off not worth amount of salvage, steamer in damaged state to be taken in payment of salvage.

(162, 190.) "PYMAN."

When the contract was fully agreed upon Capt. Burgess cabled claimants:

"Velasco, October 15, 1894.

"Pyman, Newcastle:

"Have accepted tender forty-five eighty with right to abandon; lower impossible; commence work today.

(159, 218.) "ELFRIDA, BURGESS."

The following cablegrams subsequently passed between owners and master:

"Velasco, October 18.

"Pyman, Newcastle:

"Elfrida floated; will survey.

(159, 218.) "BURGESS."

"Velasco, October 18.

"Pyman, Newcastle:

"Moller advises underwriters refuse insure unless dry docked; nearest dock Norfolk. Instruct settlement salvage, also docking.

(159.) "BURGESS, ELFRIDA."

Claimants replied as follows. (We give the message as translated:

"Newcastle, October 18, 1894.

"Steamer Elfrida, Velasco:

"When where survey; if the report of the surveyor (or diver) be favorable and certificate of seaworthiness granted by Lloyds' can you save cancelling date; must ship be put into dry dock; which is nearest?" (162.)

"Velasco, October 19.

"Pyman, Newcastle:

"The extent of the damage is not yet ascertained. The examination must be by diver. The diver can not go down at present. Expect tomorrow. The ship is quite tight. The ship will be

surveyed tomorrow. The nearest place for repairs is Norfolk. Impossible save charter. Moller refuse accept until dry docked. (159.) "BURGESS."

"Galveston, October 20.

"Pyman, Newcastle:

"Vessel surveyed. Diver reports no damage. Slight indentation. Moller refuse accept unless dry docked. Not necessary. (160.) "BURGESS."

"Galveston, October 23.

"Pyman, Newcastle:

"Have Lloyds' certificate, likewise surveyor's (diver's) report of seaworthiness; will put vessel in berth, serve notice of readiness, await results. (160.) "BURGESS, ELFRIDA."

"Newcastle, October 22, 1894.

"Steamer Elfrida, Galveston:

"Arranging payment salvage, London; proceed Hampton Roads." (162.)

This was evidently an answer by claimants to the master's message of October 18.

On the 23rd claimants wired:

"Steamer Elfrida, Galveston:

"Repeat joint names describing who they are. Money ready and underwriters wish know if salvage contract is on their form and pending receipt contract wish money deposited joint names ourselves and salvors." (163.)

Captain Burgess replied:

"Velasco, October 24.

"Pyman, Newcastle:

"Charles Clark, R. P. Clark, Galveston, contractors, wreckers, notary form, will not release until money deposited. (160.) "BURGESS, ELFRIDA."

Again, he cabled upon the same day:

"Velasco, October 24.

"Pyman, Newcastle:

"Ship arrested. Must sign release Galveston. Wire instructions.

(161, 189.) "BURGESS, ELFRIDA."

Annexed to and a part of Bell's deposition is the letter from the master, dated October 7, from which we give this extract:

"At about 9 p. m., Saturday, a big sea running the vessel showed indications of driving up on to the end of the visible breakwater, I hove on the anchor and tried to get her into a safer position, but on account of the sea running the vessel worked herself right over the breakwater, and up on to the beach alongside of breakwater, head into shore. We lost an anchor and about thirty fathoms chain in trying to keep her from the beach, the cable breaking. She now lies on the beach in a better position and not so liable to do so much damage. When the weather moderates we will have another try to float her. I have telegraphed Moller, Galveston, to inform Lloyds', as there is no means of assistance here. I came on shore this morning in the coast guard lifeboat and after a lot of trouble we managed to land on the beach. I don't think the vessel is damaged to a very large extent, in fact up to my coming on shore there was no sign of water anywhere. We expect Lloyds' agent here tonight or morning from Galveston."

We also quote from Moller & Co.'s letter to claimants, dated October 9, 1894:

"She swung around the outer end of the jetty where she fetched up on a sandy beach, where she now lies stern to sea in 9 feet of water and 6 feet at stem. With her full water ballast on board she lies firmly imbedded in sand, and does not of course move.

"This is practically all the information we have to hand so far.

Velasco is situated forty miles south of Galveston, at the mouth of the Brazos river. We suppose Captain Burgess has already notified you with as many particulars as he could give, inasmuch as he can cable you direct from Velasco. We expect him, together with Lloyds' agent, here tomorrow, when some steps will doubtless be taken (after a proper survey has been held) to heave the vessel off. We fear, however, this will be rather a tedious job, as she has to be forced through the sand out to deeper water, which is a precarious piece of work, as strong on shore winds occasionally spring up, creating considerable swell, at which time work will have to cease.

We are not sure if local wreckers here will be able to get the vessel off, and it may become necessary to procure help from the Merritt Wrecking Company, or similar institutions. We will, however, inform you regularly what progress is being made."

It was sought to be charged that Lloyds' agent, by reason of his age, 75 years, and his infirmities, could not properly attend to his duties. The record does not sustain this. He went from Galveston on the 9th of October to the stranded vessel and remained there and at Velasco for two days.

After the vessel was taken into Velasco by Clarke several telegrams passed between Burgess and Sorley relating to the survey held upon the vessel, and inquiring whether Sorley would accept the same for Lloyds', to which he assented, after having received the report of the divers and the surveyors.

The ~~evidence~~ claim that Lloyds' agent was not capable of understanding the situation and safely advising the master, or that he did not do so, is without foundation. He went to the stranded vessel, was aboard of her, knew the situation and knew what the risks were, and did the very best that could have been done under the circumstances, that is to solicit bids for floating the ship, and he recommended the acceptance of the lowest competing offer. The

whole body of the evidence vindicates the soundness of his advice. The claimants concurred in it, with knowledge of the facts, although questioning through Lloyds' the tender, because of its amount, and they acted on it, and said naught to the contrary until after the vessel was saved.

On the 7th Burgess had wired J. Moller & Co. at Galveston to advise Lloyds', and he followed it on the 8th with a telegram to the Brtish consul in these words: "Please inform me whether Lloyds' agent has left for Velasco, re-Elfrida. If not, request him to do so, as I do not care to make any arrangements until his arrival." The same day, Mr. Sorley, Lloyds' agent, wired Captain Burgess: "Will come down tomorrow; meantime, run anchors to keep afloat." (182, 185.) The captain had been running anchors, but had lost at least two with their cables.

Sorley went to Velasco and, after investigation, advised Burgess to call for tenders, which he did and obtained at least two. The notice received by Clarke was dated October 9, and was in the following language:

"Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus also to furnish all material and labor in floating said S. S. Elfrida; also time required. Reply at your earliest convenience under seal to James Sorley, Lloyds' agent, or myself. No cure no pay. Yours truly,

"B. BURGESS, Master."

"P. S. A convenient time to be allowed to get the ship off, and if at the expiration of the time the vessel is still aground, all claims on this contract to cease and to be null and void.

"B. BURGESS, Master."

How many of these tenders were sent out does not appear, but the master in response received two propositions, one for the sum

of $24,000 and one for $22,000. He cabled the lower proposition to his owners and received instructions as before stated.

Claimants contend that the master cabled his owners only partial information of the situation of the vessel, and that his apprehension that sand would bank around her was based upon representations made to him by Clarke.

If his reports were not full enough, and, for instance, did not inform the owners whether she was lying head or broadside on the beach, it seems to us they could and should have made the inquiry. It is evident that they relied, to a great extent, upon the advice of Lloyds' agent, for they claimed that the bid was excessive and had Lloyds' to communicate directly with their agent, who replied stating the ship's condition and advising acceptance of Clarke's bid.

As a fact the sand had actually banked around a part of the vessel, if not entirely, according to the master's, the pilot's and other testimony, which fact the master did not report, and her condition was in that respect worse than he stated. It is true that he testified in general terms that Clarke apprehended, as he did, that the vessel might become deeply embanked in the sand, and the impression might arise from his statement that he sent the cables of October 11 and 12, upon the suggestion by Clarke of the danger. They were not both sent upon the 11th, at least Bell's testimony shows to the contrary. (149.)

It is claimed that the owners acted upon these dispatches, supposing they were based upon some visible indications of the dangers suggested, although they only expressed a fear as to the future.

Clarke returned to Galveston on the 10th, and went back to Velasco on the 15th. This is shown by his own and Morrissey's evidence, and by that of others. (Clarke, 34, 36; Morrissey, 69; Burgess, 205.)

Therefore, not being in Velasco or near the ship on the 11th and 12th, he could not have inspired these cablegrams. Upon his return on the 15th he, no doubt, expressed himself as sharing the opinion of the master, of Lloyds' agent, and of all others whom the master spoke to on the subject.

The message sent on the 11th said: "Delay will cause danger of sand banking; also increasing cost of floating."

In the light of all the evidence and of the experience of others upon the same coast that prediction was as reasonably certain of fulfillment as anything in the future that is based upon warnings of the past; and so the cable of next day "fresh breeze blowing, vessel lying easy; making no water, afraid of sand banking up," was absolutely true, as all the evidence shows as to the recital of present facts, and the formation of a sand bank or bed was reasonably to be expected.

But, is it true that the captain acted upon what Clarke, or any one speaking for him had said, in sending these cables? Read his depositions. In the first, taken at Galveston right after the salvage, such a suggestion was not made. He did say, however, that he had received a cable to do the best he could to get her afloat and to consult Lloyds' agent, which he had done. (29.)

On November 9, 1894, he thus deposed at Norfolk:

Q. "Are you familiar with that coast?"

A. "I ought to be; I have driven all along it in a cart." (244.)

Q. "Did he (Clarke) tender his services then?" (Oct. 7.)

A. "For what the court would allow him."

Q. "You got your instructions from the owners?"

A. "Before I received any word from the owners, Lloyds' and I put our heads together, talking it over and then advertised for tenders." (242.)

He is still silent with respect to Clarke's having misled him, or having unnecessarily caused apprehensions as to the vessel becom-

ing imbedded in the sand; but his deposition was taken a third time, and on December 8, 1894, at Galveston, for the first time he intimates that he relied upon Clarke's opinion (expressed on October 15.) (205.)

We give a part of his examination:

Q. "Were or not the communications (the cables above referred to) you had with your owners based upon information that you got from Mr. Morrissey and that you could see personally there?"

A. "What I communicated to my owners was my own opinions and Mr. Sorley's" (Lloyds' agent). (197, foot of page.)

Q. "Did Mr. Morrissey say anything to you about the danger of the sand banking about the vessel where she had stranded?"

A. "I can't remember his saying anything about the sand banking around the ship." (198.)

Q. "When you communicated with your owners, did you or not give them to understand she was in a worse or better condition than she was really in?"

A. "The first cable I sent told that the vessel laid easy and gave the position and distance from deep water; then, afterwards, I wired them that there was every probability of a bank forming around the ship, which was my opinion." (199.)

Q. "You relied upon Mr. Sorley's advice?"

A. "Certainly."

Q. "Did you consult with any other persons in regard to the vessel and the best mode of getting her off besides Mr. Sorley?"

A. "I spoke to Mr. Morrissey. He was like our agent."

Q. "Did you consult the pilots down there? You spoke to them in regard to it, didn't you?"

A. "Yes, sir."

Q. "Did you ask them about the danger of the sand forming about the vessel?"

A. "Yes, sir."

Q. "What did they tell you?"

A. "They told me that the sand would form around her if the wind came in strong."

Q. "What marine experience have you had?"

A. "About thirteen and one-half years." (210.)

Q. "Are you able to speak, Captain, from your own knowledge and experience, as to the tendency of sand along a beach such as this extending down to Velasco, to form around a stranded vessel?"

A. "Yes, I have known that." (210.)

Q. "You acted upon your best judgment, Captain, did you not?"

A. "Yes, sir."

Q. "Neither the pilots nor Mr. Sorley had any interest in this contract, did they?"

A. "No more than advising me what to do."

Q. "You have no ground for saying, and, as I understand, you do not say, that any of these gentlemen, the pilots and Mr. Sorley, misrepresented any matters to you, or intentionally gave you bad advice?"

A. "No." (215.)

It is manifest and not disputed by the evidence that Captain Burgess did not rely on the judgment or advice of any one person, but made the fullest inquiry and reached his own conclusion, which, however, was in perfect accord with the views of the insurance agent, the pilots, probably with those of the captains of the Whitejacket and Lizzie, one of whom witnessed his contract, as well as with the unanimous judgment of persons who had an

intimate acquaintance with the nature of the coast, the prevailing winds and the history of other strandings, or of such of them as were witnesses upon the trial.

Captain Clarke, while at Velasco on the 9th, offered to undertake the salvage for such compensation as the United States court might award if libellants were successful. This proposition the master refused, and, instead, under the advice of Lloyds' agent, called for tenders with the results shown.

After Mr. Sorley returned to Galveston the master, on the 12th, was instructed by claimants to accept the lowest tender, if lower impossible. He at once, on the same day, sent this wire: "Sorley, Lloyds' Agent, Galveston: Have received cable, accept tender forty-five eighty, please instruct Clarke if steamer not worth salvage salvors to take vessel in lieu of salvage. Burgess." (181, 191.) This is a direct notice intended to be given to Clarke that his offer was unconditionally accepted, and we lay stress upon it because a passage in the master's evidence, upon which claimants rely, would make it appear that Mr. Morrissey, Moller & Co.'s agent, had wired them that Clarke's bid was accepted before Burgess actually received the cable. If this were true, why should Burgess have also wired Sorley to inform Clarke of the acceptance of his offer—unconditional as to price? As to this matter Mr. Morrissey testified: "I told him when he showed me the telegram accepting the bid that I would telegraph Moller & Co." (49.)

Q. "Did the master himself show you the cable?

A. "Yes, sir." (49.)

Q. "The cable showed that it was received at Velasco at 1:40 p. m.?"

A. "Yes, sir."

Q. "And the proof shows that it was delivered to the master about 2 p. m., and that your telegram was sent to Moller with ref-

erence to the same matter at 2:15 p. m. of the same day—did you ever open any of those messages?" (Sent to Burgess.)

A. "No, sir." (50.)

The claim of claimants and their captain that the contents of the cable authorizing acceptance of the lowest bid, if lower impossible, were known to Morrissey, and that he had wired that Clarke's offer was accepted before Burgess received the message, is absurd and can not stand for a moment when all the facts are stated.

Bell, one of the claimants, testified that the cable was sent from Newcastle about 3 p. m. of the 12th; allowing six hours for the difference in time, that would have been about 9 a. m. at Velasco. Doubtless it was delayed in transmission, and had reached there at 1.45 p. m., as the operator testified, and was delivered to Captain Burgess and receipted for by him at about 2 p. m. Morrissey wired Moller that Clarke's bid was accepted at 2.15 p. m. Claimants' proposition is that at 8 a. m. of that same day, at least one hour before the message was filed in England, and nearly six hours before it reached Velasco, Morrissey knew of it and wired for Clarke. In other words, that he knew of it long before it was sent, possibly before it was written. This scarcely requires comment. The agent at Galveston shows that the message from Clarke to Burgess, stating that the contract price was agreed to, was filed in Galveston at 8 p. m., or, as the second file mark, that of the operator, shows, 7.59 p. m., the difference in time pieces accounting for the odd minute. (Smith, 172, 144.)

Morrissey's dispatch was received in Galveston that afternoon and Clarke answered it direct to Burgess that night.

Vaughan, the operator at Velasco, admits that it may be a mistake. That instead of a. m. it may be p. m. His record was lost. (121, 176.)

Morrissey testified that the captain received this dispatch that night at the hotel between 8 and 9 p. m. (51.)

The purpose of this contention of claimants is to make it appear that the master had no opportunity to make a better bargain, as Clarke, knowing his instruction to accept the proposal, if lower impossible, naturally refused to take less. But, as we have seen, Burgess wired Lloyds' agent an unconditional acceptance of Clarke's offer with a request to inform Clarke. (191.) Hence it is plain that he did not then try to get lower terms from Clarke as the latter had already informed him, in effect, that he would not do it for less when he made the bid. (205.) Again, he wired charterers at Galveston on the 14th if Clarke could not come to send some one else at same price. (190.)

THE SITUATION OF THE ELFRIDA, HER PERIL, PRESENT AND PROBABLE, THE SHORE WHERE SHE WAS STRANDED, THE EXPOSURE TO WINDS AND SEAS AND THE EXPERIENCE OF OTHER VESSELS WERE SUCH AS TO JUSTIFY THE APPREHENSIONS OF THE MASTER, WHICH HE CABLED TO THE OWNERS.

M. P. Morrissey, who lived at Velasco, testified:

Q. "What is the nature of the shore along there?"

A. "Quicksand."

Q. "What is the tendency of a body resting upon the sand, especially where the waters cover it, with respect to its remaining in its position or settling in the sand?"

A. "It would settle, because the sand would move around with every tide. The sand there is always shifting and moving."

Q. "Have you ever had any knowledge of a body or substance sinking in the sand there?"

A. "Yes, sir." (52.)

A. D. Smith, formerly a ship master, and for many years a pilot on the Galveston bar and familiar with the coast, was asked:

Q. "Does the position of a vessel become more critical or dangerous or less when beached?"

A. "It becomes worse."

Q. "Will you state whether or not there is any reason to expect sand to form around a vessel lying on the beach for a number of days?"

A. "I have known them to wallow in the sand and make a bed for themselves; the sand forms around them like a hog wallow." (74.)

In describing her launching, A. Coveney, the pilot, said: "The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.)

Captain Wm. Scrimgeour, a pilot of twenty-four years' experience upon this coast, was asked:

Q. "What would be the danger of a formation of sand around the vessel?"

A. "If the vessel is on the bottom and there is a sea or current running at all and the ship was lying so the current would sweep upon her, sand would bank up on the side the eddy is on. I have seen it bank up so that you could walk upon it. A change of the current would cause it to disappear from that side and fill up on the other side. These sands move with the current."

Q. "It is fine, movable sand?"

A. "Yes, sir. The water is thick with it." (92.)

Captain W. A. Hutchings, for thirteen years superintendent of the Eighth Life Saving District, embracing the coast of the United States upon the Gulf of Mexico, explained the sometimes peculiar action of the sand. One stranded steamer made a circle of 600 feet in the sand and at other times vessels would lie in their beds of sand. Sand is moving here all the time. (98.)

Q. "Do you know of your own experience that this sand will sometimes bank up and at times will wash away again?"

A. "Yes, sir."

Q. "If the sand bank up in one direction and you should get a wind and sea from right angles, it would remain there banked?"

A. "Yes, sir." (102.)

"The surf in nine feet of water breaks very viciously and it would have a tendency to lift her stern and drive her up the beach, from the simple fact that this sand becomes liquid, and with any motive power the sand gradually is displaced and the vessel works herself in and forms a bed for herself. She goes gradually and gradually to the shore and makes a bed for herself." (103.)

Captain James McDonald, another old ship master, who went to sea from 1852 until 1874, and since then has been a pilot on this coast and knows it well (107), testified that the sand would bank first upon one side and then upon the other of a vessel with head at right angles to the shore, as the Elfrida was, which would be caused by the litoral currents, and whenever the sea came in heavily she might go in broadside. (113.)

He shows how the breakwater at Galveston settled about seven feet in the sand, and that where there used to be nine or ten feet of water 200 acres of land have been made by the force of the currents. (113.)

Captain F. Johnson, a pilot on the coast of Texas, and at the mouth of the Brazos river, testified that the Elfrida was in danger of going higher up. That the water was only five feet deep at her port hatch. That a vessel lying in that position one current and sea might bank sand around under certain parts of the vessel and wash it away from another part of the vessel, which would strain the vessel and be apt to start her plates. (115.) Then the sand would enter and she would settle down.

He was on board the tug Josephine five and one-half days while

preparations were being made and the Elfrida was taken off. This witness was asked:

Q. "Did your own opinion correspond with the advice of the masters of the other vessels as to the necessity for prompt action?" (In taking off the Elfrida.)

A. "Yes, sir. Where that vessel struck there is only two feet of water to-day."

Q. "Why is that?"

A. "Sand banked up."

Q. "Caused by the jetties in that neighborhood?"

A. "Yes, sir." (119.)

AS TO THE EXPERIENCE OF OTHER STRANDED VESSELS.

Captain A. D. Smith testified as to the loss of the ship William, which was well up on the beach, bow on, and as soon as she began to float they undertook to turn her and she struck again and beached and became a total loss. She was of 1000 or 1200 tons. (72.)

The bark Flora of about 600 tons was successfully taken off.

The Francisca worked some distance through the quicksand and was, after twelve days' stranding, floated in a badly damaged condition. (78.)

Captain Wm. Scrimgeour told of the iron steamer Alabama, about 400 tons, which went ashore and was gotten off badly damaged with her back broken, after much trouble and expense. (93.) R. Ross testified to the same effect. He worked on the Alabama. Made three attempts to get her off. (124.)

The Australia, an iron steamer of 2000 tons, went ashore near Velasco and the Merritt Wrecking Company, of New York, brought down a plant and got her nearly off, but a gale of wind

came along and blew her upon the beach again and they had to go all over their work. (Scrimgeour, 94.)

Two iron steamers, the Arcadia and Carolina, were total losses by stranding, but no effort was made to get them off. (94.)

Wm. A. Hutchings, life saving superintendent, testified to the loss upon this coast of the Laura R. Burnham and the Ella Elliott, wooden vessels, both of which settled in the sand and *entirely disappeared.* (100.)

The ship William, the schooners Odessa and Welcome, the bark Abeona and others were all lost by stranding. (Ib., 96.)

The steamer Aransas, about 900 tons, stranded and was seriously damaged.

The San Marcos stranded, but was taken off. (100.)

This witness stated that if an iron vessel pounded any length of time the rivets would start, and then she would be in a worse position than a wooden vessel. (100.)

Captain J. McDonald told of the loss of the bark McDowell by stranding near where the Elfrida went ashore. (108.)

He also told of the Australia (see Captain Scrimgeour's evidence, *sup.*), and the bark Houston. The latter was taken off and a gale of wind came on and she went ashore again and broke her back. Mr. Hunt, who bought her, spent about $30,000 to get her off, but finally lost her, a total wreck. (107.)

Captain McDonald, on cross-examination, recalled the stranding of several iron steamers, among them the steamer Reindeer, which was lost on St. Joseph's Island. The others were saved. (110.)

Captain Burgess, in his second deposition, was thus examined:

Q. "How near was the vessel from the beach?"

A. "About three to four hundred feet."

Q. "How far was she from the breakwater?"

A. "She would be about the same distance, as near as I can judge."

Q. "About how deep was she in the sand?"

A. "She was about two feet; at the stern the most." (243.) (Ross, 123.)

Robert Ross, a witness for libellants, and who had been a seafaring man, knew the coast well and was at Velasco when the Elfrida stranded, testified that she was in a dangerous position. That she was likely to start leaking by thumping and starting her rivets, and then would *sand up*, which generally results in a total loss. (123.)

Captain F. Johnson, one of the pilots at Velasco, testified that the Elfrida, after going ashore, was nearly parallel with and about three hundred feet west of the west jetty, and that her stern was in line with the visible end of it and of the east jetty, which was 500 feet from the west, and was out of water one foot for about one hundred feet further out. There was some strong winds while she laid there. He tried to go alongside of her with a tug, but could not. (114.)

She was four or five hundred feet from the beach and four hundred feet seaward from her it was eight feet deep and five feet at her port hatch. Under advice of the captains of the White Jacket and Lizzie, Captain Brock ran out kedges when she first grounded, but they would not hold, neither would an anchor that Brock put out. She was in danger of going higher up. (115.)

The sand banking at one part of the vessel and washing away at another part would be likely to strain her and start her plates; she would then bilge and the sand would enter and cause her to settle. That a southeasterly wind, which was the prevailing wind, would probably drive her higher upon the beach. (116.)

Bad or stormy weather could reasonably have been anticipated at that time of the year. (117.)

The log heretofore quoted verifies this testimony as to rough weather.

Captain A. D. Smith, called for libellants, testified that he considered the situation of the Elfrida very serious. It could not become better and it might become worse. In the event of high winds or stormy weather, she would be liable to damage or total loss. Such winds would prevent them from working on her or running anchors. She might go higher upon the beach and sustain a total loss, as has occurred upon this beach. (72-3.)

A storm or heavy blow was to be expected in October. (74.)

The worst winds were from the east and southeast. (She was beached by an east wind.) (75.)

When stranded vessels are in quicksand, they always have a tendency to work in. They never fail to do that when you have a current. (80.)

The jetty would be no protection with the southeast wind, or with any wind around southward to the west. (81.)

McDonald swore: The weather is uncertain in October. We have had hurricanes in that month. (107.)

If the sea and storm rose sufficient to drive her up it would be harder to get her out to deep water. (111.)

Coveney testified: It was an east wind that took her up. If the wind had gone to the southwest the sand would have probably banked or thrown her broadside on the beach. (88.)

The tide was much higher than usual when she was taken off. The probable effect of an equinoctial gale would have been a total loss. (89.)

After she went over the jetty she lost two kedge anchors and a bow anchor and fourteen or fifteen fathoms of chain. (90.)

Captain Scrimgeour testified as to the prevailing winds in October being eastwardly and southeastwardly. (91.)

He was asked: "Suppose the vessel is grounded and is in, say,

five feet and one-half forward, taking an average tide, and seven and a half feet aft, and the vessel's draught is eleven feet, ten inches, and she is settled in the sand about two feet, would she or not be in a perilous condition?"

A. "If there was a big tide and a gale it would bring the vessel in higher on the beach, and in doing that the vessel would likely go to leaking, and then she would sink with the sand."

Q. "And then what?"

A. "It is a hard matter to do anything at all with them then, and we generally give them up."

Q. "As a total loss?"

A. "Yes, sir." (92.)

"I would not consider her safe as long as she was on the beach." This the witness stated in answer to the question as to the effect of reducing her draught from 11.10 to 10 feet by putting out ballast, and further, that it would be necessary to procure prompt assistance to get her off in case of a heavy gale. "October is the windy month up to about the 20th." (92.)

The heaviest winds are south and southeastwardly. (95.)

Captain Hutchings testified as follows:

Q. "Under what conditions would she be lost?"

A. "Such as a heavy southeasterly wind. I would say she was in a precarious condition, liable to be bilged by lifting up and down and filling with sand. That is probably the most dangerous position. As long as you can keep them tight there is hope, but when the vessel commences to rise up and down, she settles very rapidly in the sand, especially if the surf is heavy, and in time she will go out of sight, while wooden vessels break up and go to pieces."

Q. "What, if any, is the necessity for prompt action where the vessel is stranded 1000 feet from deep water sufficient to float her?"

A. "Placing myself as captain of the vessel, I would be in grave apprehension as soon as she struck and would use every means to get her off as soon as possible. I believe that every minute a vessel lays on this beach enhances the danger. There is no time to delay. Even an ordinary fresh breeze causes a good surf on this beach. An ordinary breeze blowing twenty miles an hour, which is considered a strong breeze, and the wave action will break up a vessel or drive it up higher on shore." (97.)

To the same effect was the testimony of Captain Johnson, the pilot. (116.)

The wind record at Galveston (253), forty miles distant, shows an east wind on October 6th, blowing a maximum of 18 miles per hour.

On the 8th, a north wind, with a maximum of 33 miles.

On the 10th, a southeast, with a maximum of 15.

On the 11th, a southeast, with a maximum of 18.

On the 12th, a southeast, with a maximum of 12.

On the 13th, a north, with a maximum of 24.

And on the day she was taken off, the 17th, the wind was southeast, with a maximum of 9 miles per hour.

On page 146 of the record is given a table showing the winds for each month, compiled for twenty years, official records of Galveston. It appears from that that the prevailing direction in October is southeast. The average hourly velocity is ten miles and the highest hourly velocity is sixty miles, and that it is the same in September, fifty-three maximum in August and fifty-four maximum in November.

AS TO THE PREPARATIONS MADE BY SALVORS, THE NATURE AND VALUE OF THEIR PLANT AND APPLIANCES, AND THE WORK DONE AND RISK INCURRED BY THEM.

Captain Clarke prepared and equipped two tug boats, the Seminole and Josephine. He had two schooners, the Lewis Dolson and the Dixie, to bring down the large wrecking anchors and a month's supplies from Galveston, and he hired two barges at Velasco, for one of which he agreed to pay $6500, if it should be lost in the service. The schooners could not perform the work. Two of his anchors weighed 7000 pounds each. He employed between twenty and thirty men. (Anderson, 124; Clarke, 36, 38, 39, 43.)

The anchors, hawsers, etc., were transferred from the schooners to the lighters. (44.)

Q. "How many did you have in your service altogether?"

A. "One day we must have had thirty-five men."

Q. "What provisions did you take—supplies for your men—for what period of time?"

A. "For a month. I took plenty of everything."

Q. "Did you expect to be engaged a month?"

A. "I did not know how long. I did not think I would be so lucky." (44.)

Q. "Then you took four vessels there—two of your own and two which you hired?"

A. "Yes, sir."

Q. "And you hired two barges there?"

A. "Yes, sir." (44.)

The schooners could not be used on account of their draft and the rough seas, and hence the barges were secured. One of them and one of the tugs were used in planting anchors and towing, and the others were at hand if needed. (Clarke, 36 to 43; Scott, 226.)

Captain Johnson, a pilot, and who also had charge of the steam tug Seminole, testified that the plant which Captain Clarke had was worth from $35,000 to $40,000. (116.)

They were engaged three days and a half (from time of leaving Galveston) in getting everything in readiness to take the Elfrida off, in running anchors and hawsers. He (Clarke) had one of Mr. Brock's lighters there and a derrick barge which belonged to the syndicate, under Captain Brock's control. (116.)

Captain Clarke, upon his second trip to Velasco, which was on October 15th, the day of signing the contract, found that he could not use the schooners which he had for putting down anchors with which to heave off the steamer, and he hired a lighter from Fred Brock at Velasco, who had bid for the contract at $24,000, and also obtained Brock's assistance and that of eight of his men in working on the lighter and getting out anchors and chains. Clarke guaranteed the safe return of one of the lighters, worth $6500 (it appears that two were engaged), but it was found that one was sufficient for the work. He used four anchors, two of his own and two of the steamer's, which were taken off of her bow to lighten her. (38-9.)

On page 40 he describes how the hawsers and cables led from two large anchors to the port quarter, one to the starboard quarter and one leading forward from anchors, and all carried to the winches. The anchors astern were place at about fifteen hundred feet from the vessel. (45.)

They were at work placing the anchors two days, and on the afternoon of the 17th, in about four hours' heaving, the vessel was hauled off, the principal difficulty being in getting her started. She was about one thousand to twelve hundred feet from water of sufficient depth to float her. (44, 45.)

She was then taken in tow by the tug.

The pilot, A. Coveney, also described the salvage substantially

the same. The vessel's engines and winches were used in heaving on the hawsers. It was some time before she started. "A mighty slow start. The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.)

She had settled two feet deep in the same. She was on a line with the seaward end of the jetties, but was not protected from the southeast winds. (89.)

The chief mate of the Elfrida, Peter Scott, testified that they pulled on her perhaps a half or three quarters of an hour before she moved.

Q. "Did she come along gradually and easily then?"

A. "She came along with sudden jerks; we could feel her. There was a jerk and a stop and then another jerk. They pulled at her three or four hours before she was floated." (226.)

The witness Hutchings testified that judging from the salvage work Clarke had done his was the most complete plant and equipment along this coast. (104.)

The plant was exposed to some risk, although the weather was fine.

In answer to the question regarding risk, Pilot Johnson says: "His (Clark's) tug was exposed to risk. I was on her myself at the time. He asked me to get on the tug as I was more familiar with the place than the captain and she was thumping hard." (116.) He took her close to the stern of the Elfrida in taking the lighter in as close as possible, and the pounding of the tug made him apprehensive that she would break to pieces.

He states that both Brock's lighter and derrick barge were used, and the lighters ran anchors and cables. (116-117.)

Captain J. Anderson, sworn for libellants, also testified to the fact that Clarke had laid in a supply of provisions for about five weeks, had hired his schooner and the Dixie to carry down men and plant. He had from twenty to thirty men. (124-5.)

Captain Burgess, for claimants, testified: That salvors were two days laying anchors, and about three and one-half hours pulling her off. (208.)

That Captain Clarke had suggested to him when the vessel first stranded that he would salve her for what the United States Court would allow, which the master refused, and Clarke offered to lend him his tackle. (209, 243.)

On 243 he swears that he had 140 tons of coal aboard, enough to take him back to Newport News, and yet Morrissey (53) deposes he had to buy coal at Velasco and had only from fifty to sixty tons.

Burgess says the ship was two feet deep in the sand, and on the same page (243) he expresses his individual opinion that a bank of sand would have formed around her, that "after pumping out ballast and working the engines, we worked her loose and raised her that much."

VALUE OF THE ELFRIDA.

Captain Burgess was examined upon this point thus:

Q. "What was the value of that vesel?"

A. "About £22,000."

Q. "That is inclusive of her engines and machinery?"

A. "Yes, sir. That is as near as I can get to it. It might be less, as they diminish in value all the time."

Q. "That is your best judgment?"

A. "Yes, sir. As near as I can give you." (213.)

Thomas Bell, one of the owners, testified: "A boat of her size, type and tonnage could have been bought new in October last for the sum of £20,000, and deducting from this amount 6 per cent annual depreciation, I arrive at the Elfrida's value as £14,000 after being salved at the latter part of October, 1894. At the time of her stranding she was insured for the sum of £18,000, but we

have since reduced the value to £16,000. These amounts are book values only and have regard to the fact that she was bought at a time when steamship tonnage was 15 per cent dearer than during the past six months." (148.) He still fails to explain how, if the vessel was worth only £14,000 at the outside figure, he still carried an insurance of £16,000.

One of the witnesses, J. Moller, however, thus deposes:

Q. "How much are they (vessels) generally insured for relative to their value?"

A. "No one insures a vessel to her full value unless he wants to lose her; then he will make it as high as possible."

Q. "A vessel insured for £18,000 may be presumed to be worth £20,000?"

A. "That is a very hard question to answer. I am familiar with it in the abstract sense. A vessel insured for £18,000 is supposed to be worth it." (134.)

The value of the vessel should not be a controlling element in this case, but we mention it because the vessel was undoubtedly insured and her insurance comes nearer representing her true value. It is a matter of common knowledge, and this record discloses that the rating given by Lloyds' and other insurance organizations is based upon actual value, and it is not likely that this vessel would be allowed to carry an insurance of £18,000 unless in the judgment of the insurance surveyors and inspectors she was regarded as worth that amount at the very least, and probably more. Nor does Mr. Bell account for his alleged 6 per cent annual depreciation, nor explain that it is actual or estimated, or that it is the established and accepted depreciation in the shipping market. For aught that appears, it is a deduction of his own, made without any facts to support it, at least to the amount that he claims. The vessel was built in 1889; at least five years deprecia-

tion would reduce her value at that rate 30 per cent, which is scarcely likely.

ASSIGNMENT OF ERRORS.

Petitioners assign error in the decree and decision in this cause of the Circuit Court of Appeals in the following particulars:

1. For that the said court in the majority opinion considered the question of compensation without sufficient regard to the contract that had been fairly and deliberately made between the parties, dealing with the question as one of the proper measure of compensation for salvage services independently of a contract.

2. For that said opinion held that the compensation for salvage stipulated for by the contract and allowed by the District Court was excessive to such an extent as to be unreasonable.

3. For that the court held that the master and owners of the Elfrida accepted the contract with the understanding that they had no other option; libellants had offered when the ship first stranded to perform the service for such sum as the court might allow, and other relief could have been had from New Orleans if not from Galveston.

4. For that the only ground upon which the amount of the salvage contracted for can be claimed to be excessive is because of the signal success of the salvors within the time employed, which fact is not sufficient of itself to avoid the contract.

5. For that the court held that the amount was excessive in view of the outlook and apparent conditions existing before and at the time the contract was made.

6. For that the court gave no consideration whatever to the risk that salvors assumed under the twenty-one days' limit, in which time their work might have been prevented, interrupted and delayed by casualties, or winds, or seas, and they have received no compensation whatever, although at the end of the twenty-one

days they might have brought the vessel to within a few feet of floating.

7. For that the court held that the danger of the Elfrida was greatly exaggerated. The record does not sustain this.

8. For that the court did not follow the rule announced by this court that a contract for salvage service and compensation will be enforced where the salvor has not taken advantage of his power to make an unreasonable bargain.

9. For that the court annulled the contract because the compensation appeared excessive in the light of the time and work actually employed; whereas, the judgment of the District Court should not have been set aside unless the compensation was so grossly excessive as to shock the conscience.

10. For that the court held that the contract should be set aside because the execution of it turned out more easy than was anticipated at the time it was made.

11. For that the court held that while the vessel was stranded and the wind was blowing on shore, the maximum velocity was fourteen miles an hour. The record shows eighteen miles directly on shore. Another day, twenty miles from the eastward, and the wind from this direction drove the vessel ashore. Twenty-four miles another day from the northeast, which caused a heavy surf.

12. That the court did not attach sufficient importance to the log of the Elfrida and the testimony of the master which showed the exposure, danger and risk.

13. For that the court held "that on the whole it appears from the character of the bottom, the smooth water and gentle winds which are to be expected in that soft climate in a month notable for its mildness, that the Elfrida was in little danger," while we contend that the evidence shows that the bottom was quick-sand in which vessels had sunk and disappeared. The waters were not

smooth; on the contrary, even a wind parallel with the shore would cause a heavy surf, nor were the winds gentle. October was a month of storms and tempestuous weather, and was not notable for its mildness.

14. For that the court found that the Elfrida was at no time seriously imbedded in the sand. The evidence shows the sand formed banks or washed away with the currents, and that she was working into the sand.

15. For that the court held that the owners of the ship were ignorant of her true condition. If the cablegrams did not inform them, the letters of Burgess and Moller must have done so, and there was time for them to have been received in due course of mail before the vessel was taken off.

16. For that the court found that the Elfrida was worth only about seventy thousand dollars. She was insured for much more than that and the evidence of her master shows that she was worth something in excess of the insurance, or about one hundred and ten thousand dollars in all.

Wherefore, libellants pray that a decree be entered in their favor for the compensation provided for by the contract, with interest thereon at 6 per cent per annum from October 24, 1894, the date of filing the libel in the District Court.

POINTS AND ARGUMENT.

I.

WHEN A SALVAGE CONTRACT HAS BEEN FAIRLY ENTERED INTO AND THE SALVOR HAS NOT TAKEN ADVANTAGE OF HIS POWER TO MAKE AN UNREASONABLE AND INEQUITABLE BARGAIN, THE FACT THAT THE COMPENSATION MAY BE DEEMED EXCESSIVE, ON ACCOUNT OF THE WORK HAVING BEEN

PERFORMED IN LESS TIME AND WITH LESS TROUBLE AND EXPENSE THAN WAS EXPECTED, WILL NOT JUSTIFY SETTING IT ASIDE, AS THE PARTIES HAD THE RIGHT AND WERE PRESUMED TO TAKE INTO CONSIDERATION ALL THE ELEMENTS OF UNCERTAINTY AND THE INTERESTS AT STAKE IN MAKING THE CONTRACT.

To avoid the agreement, such excess must appear to be so grossly disproportionate to the nature and result of the work, the value saved, the uncertainties, risks and outlay incurred, and the means employed in the undertaking, as to render the agreed recompense unconscionable.

In a case where there was no contract the familiar principle is thus laid down:

"The action of the court in allowing salvage is one involving judicial discretion and an appellate court will not set aside the result of the exercise of that discretion by the trial court unless it has been manifestly abused; or unless, as Chief Justice Marshall expresses it in The Sybil, 4 Wheat., 98, the award of the District Court is so grossly excessive as to shock the conscience of the appellate court.

The Comanche, 8 Wall., 448.

Hobart v. Drogan, 10 Pet., 108.

The Phoenix, 62 Fed., 487.

The Connemara, 108 U. S., 359.

The Florence, 71 Fed., 527.

The only point for discussion in the case, therefore, is whether the allowance by the court below was grossly excessive and not whether, if we had been sitting in the trial court, we would have fixed a somewhat less amount."

The above is taken from the opinion of the Court of Circuit

Appeals of the Sixth Circuit, delivered by Judge Taft in the R. R. Rhodes, 82 Fed., 751.

It must be borne in mind that this is not a question as to the proper amount of an award in the absence of a contract, but as to the validity of a contract fairly and deliberately made, after the fullest opportunities for investigation, and in full communication with owners and other salvors, and unless such a contract so made provides for compensation out of reason and proportion to the services rendered, the chances taken, and the property saved and restored to the owners, the contract must, under the authority of this court and the almost unbroken current of decisions elsewhere, be given the effect that the parties agreed and intended it should have when made, although such amount may exceed the sum that an admiralty court would have awarded for the salvage had there been no contract.

There is a wide range in the judgments of courts in making salvage awards where there are no contracts, and it can be safely said that no fixed rule or uniform scale has been found directing the court to a certain and satisfactory result in every case; hence, for this reason, in addition to the fundamental rights and obligations of the law of contracts, the principle is recognized and followed that an agreement for salvage compensation will be given effect unless totally contrary to justice and the equity of the case.

Let us examine briefly the element of uncertainty.

This entered into the contract as has been well stated by Circuit Judge Pardee: "At that time (when the contract was made) according to the evidence, all parties thought the matter of floating the Elfrida would be a difficult and tedious work, necessarily taking time and accompanied with great risk of success. That the master and owners so believed is shown by the fact that they required the salvors to do the work in twenty-one days and stipulated for the option to abandon the ship in lieu of paying the sal-

vage agreed upon, and that the contractors so believed is shown by the extensive preparation made to carry out their contract. The contracting salvors prepared a month's supply for their force, procured cables, gear, chains, anchors, two tugboats, lighters and two schooners, fully manned and equipped, and hired a large force of men," etc. (275-6.)

He further says: "Our inquiry should be, to-wit: as the circumstances were at the time the contract was entered into between the owners and salvors of the Elfrida, did the salvors take advantage of their power to make an unreasonable bargain? Or, in other words, was the amount of salvage contracted for excessive in proportion to the value of the property salved to such an extent as to be unreasonable?" (274.)

The witness, Captain A. D. Smith, whose testimony to the effect that "almost anything may be taken off the beach; the question is whether it is worth it," was relied upon by claimants and by the Circuit Court of Appeals, which set aside the contract and awarded salvage in accordance with claimants' contention. This witness, however, was immediately examined further as to whether or not the cost of getting a vessel off could be determined in advance.

A. "That would be difficult to do."

Q. "Is not that very problematic as to the time, labor and cost?"

A. "Yes, sir. You have everything to contend with. Sea, weather and everything else. In taking a vessel off the beach you might have everything ready to get her off, and then bad weather might set in and you would have to stand by and see everything busted up and it would have to be done over again."

Q. "It is contingent upon the weather and circumstances?"

A. "Yes, sir. The weather is the principal thing to consider. You can not do anything in bad weather and the condition of your

vessel is then much worse. You have to abandon your work during bad weather."

Q. "Can there be any reasonable determination in advance how long it would take to get a vessel off?"

A. "It can not be determined in advance. It is a pretty risky thing to say how long it will take to get her off." (74.)

In our statement of the case will be found much more evidence confirmatory of the foregoing.

Thus it was that Captain Burgess provided a time limit of twenty-one days, and the injustice of setting aside this contract is manifest when we consider that the winds and seas might have prevented Clarke from accomplishing his undertaking within the time allowed, or might have interrupted and delayed him, and heavy weather have borne the ship farther up, or sunk her deeper in the sand. This very uncertainty was a factor necessarily taken into consideration in fixing the contract price. In the light of the history of previous wrecks, the instability of the weather in October and the shifting sands, it was not unreasonable to expect that the task might have been delayed and the twenty-one days entirely consumed without complete success, although the vessel might have been drawn to within a few feet of deep water. Then when the time ended, salvors could claim nothing and the master could have her heaved off the remaining few feet at a small cost. Other vessels had required much longer time than that to float them, and the Elfrida might have received the benefit of Clarke's labor and skill to the verge of floating and he would receive no compensation whatever. The time limit was onerous upon him and justifies larger salvage. In an ordinary case of salvage there is no such limit imposed.

As remarked by Judge Pardee the master called for competing bids, received more than one and accepted the lowest in a contract

which fully protected the owners and threw all the risk on the salvors with a time limit.

Is not such a condition also one of the ingredients of the consideration which should not be ignored?

As Judge Brown held in the Alert (S. D. N. Y.), 56 Fed., 721, where the defenses were that the salvage contract was excessive and exorbitant, and made under a mutual mistake of fact, namely, upon the supposition that only a small amount of cargo was on board, it was not a case of mistake, but only uncertainty as to the amount of cargo, and *this element of uncertainty was in the minds of the parties before the contract was signed, "and it was made in view of that very uncertainty."*

In the case at bar the agreement was entered upon in view of the very uncertainty as to how long it would take and by what means the Elfrida could be salved. All of this depended upon several matters; upon the condition of the weather, of the steamer herself, the bed in which she lay and upon the winds, currents and tides, upon storms and calms; in brief, upon many contingencies which the parties could not pre-determine, and which, as all cases of stranding along this coast taught them, rendered the salvage of the Elfrida extremely uncertain, both as to time, means and cost, if in fact it could be accomplished at all.

As Judge Brown further observed in the Alert, where the recovery was fifty thousand dollars, or fifty per cent of the value of the cargo and vessel:

"Looking at all the circumstances, as they existed and were appreciated at the time when this contract was made, both as regards the ship and cargo and the *interests, risks and reasonable apprehension of all parties*, I think any interference by the court with the enforcement of a contract so fairly and deliberately made and executed as this, would, as a matter of general policy, be productive of more harm than good." (Italics are ours.)

The Alert went ashore upon a sloping coast of soft, yielding sand. She was high up on the beach with only about six feet of water around her, except in the bed or cradle in which she lay. She was moved a short distance, but the hawsers broke and she went back head on to the beach. Upon a second attempt, after heaving ten hours, she reached deep water undamaged. She did not leak.

Note how analogous in many of the circumstances of coast, depth of water, length of time in heaving off, the undamaged condition of the vessel, the sand bed in which she lay and the element of uncertainty, is that case to ours.

It is there held that it is the right and the duty of a court to examine into the fairness and reasonableness of salvage contracts, yet it is shown that the rule requiring such scrutiny and the reason therefor have reference to contracts made at sea, in peril and under the pressure of immediate necessity. "But these considerations are applicable but slightly, if at all, to contracts which, like the present, are made upon land, between the parties dealing upon equal terms, with full opportunity for deliberation, with equal knowledge of the facts and under the ordinary conditions of non-maritime contracts. Such contracts should be treated like other voluntary, deliberate contracts for a specific service." Citing:

Bondies v. Sherwood, 22 How., 214.

Agnes I. Grace, 49 Fed., 662, and 51 Fed., 959.

The Great Northern, decided by District Judge Hughes, E. D. Va., 72 Fed., 678, deals with the question as to estimating the value of a salvage service by the circumstances prevailing at the time the services were entered upon, and by the conditions and casualties which experience teaches are liable to happen in the ordinary course of events while the service continues, and the fact that the weather and sea afterward proved favorable is not a reason for diminishing the award. Judge Hughes quoted from the Strath-

garry (1895), Prob. 264, which was a case in which a sum was agreed upon between salvor and salved before the service was undertaken.

The high court of admiralty, Bruce, J., said: "In forming an opinion of the fairness or unfairness of the agreement, I think the court must regard the position of the parties at the time the agreement was entered upon. The agreement can not become fair or unfair by reason of circumstances which happen afterwards."

The Agnes I. Grace (C. C. A., 5th Cir.), 51 Fed., 959, affirming 49 Fed., 662, is very similar to this case and ought to be a precedent. Its main features illustrate and sustain our contention and Judge Pardee's dissent. It quotes with approval Dr. Lushington in the Helen & George, Swab., 368, and the plain rule declared in the British Empire, 6 Jur., 608, in these words:

"When there has been a definite and distinct agreement, with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it." And also, the Supreme Court, in Post v. Jones, 19 How., 150: "Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain."

This schooner was stranded and in danger of total loss. The master was helpless but thoroughly conversant with the situation and circumstances, and had ample time and opportunity to make such investigations as were necessary to enable him to procure assistance. After full consideration, he entered into a contract which he regarded as favorable as could be made. The agent of the underwriters at Savannah visited the schooner while on the bank, after the agreement had been made, and it does not appear that he made any objections to the terms of it. The master had every opportunity to solicit assistance.

The court say: "This case can not be considered as belonging to that class of cases of contract for salvage service where the master being upon the high seas, or on an uninhabited coast at a distance from all other aid, is absolutely helpless and without power to procure assistance other than that offered, and compelled in consequence to make a hard and inequitable contract."

"*Before the performance of the services the agreement appears to have been considered by all fair and just; and, if so then, it can not now be considered otherwise because of its successful rendition by appellees who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high, in proportion to the value of the property saved, this court does not deem it sufficiently unreasonable to disturb the judgment of the court below.*" (Our italics.)

It is true that the Agnes I. Grace would probably have sunk in the sand sooner than the Elfrida, but, aside from this, their positions were, in many respects, similar. Almost the entire evidence in this case, based upon experience, justified the conclusion that the Elfrida would, before any other assistance could have reached her, have been driven further upon the shore, or would have been banked up by the sand, or would, by the violence of winds and seas, and by contact with the bottom have started her rivets, or broken her plates, and thus the sand have effected an entrance, causing her to settle more rapidly. Any of these contingencies and probable perils might befall her. It would have been many days before effective help from elsewhere could have reached her. Her position was one of daily, if not hourly peril. She had lost some of her own anchors and cables in unsuccessful efforts to heave off.

The master of the Grace had engaged to pay the salvor the sum of $5000, about five-twelfths of the value of the property saved, and the contract was held valid.

In Jones on Salvage (99), the English rule is thus declared:

"If a salvage agreement be proved, the court will uphold it, unless it be clearly inequitable; and it is no answer to the agreement to say that the bargain is a hard one upon the salvors; or that greater difficulties than were anticipated, in consequence of the change of weather, attended its performance; or that the weather became tempestous; or the vessel was longer in arriving in port than might have reasonably been expected. *Nor, on the other hand, can the owner of the vessel receiving assistance refuse to pay the amount stipulated for, on the ground that the salvage services were attended with less difficulty than had been anticipated, unless, indeed, the sum happen to be so grossly exorbitant as to amount to evidence of bad faith or fraud, which, of themselves, would induce the court to set aside the agreement.*"

In the Medina, 1 P. D., 272; 2 P. D. 5; Ken. Civ. Salv., 206, Brett, L. J observes: "I think that the old rule of the admiralty court ought not to be lightly encroached upon, viz.: that where there is an agreement made by competent persons and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to show that it is inequitable."

Kennedy on Civil Salvage, 212, thus condenses the doctrine of the more important cases upon this subject in England:

"But the court of admiralty does not set aside a salvage contract which appears otherwise unobjectionable, merely because in the circumstances as they have in fact happened it would, but for the contract, award as salvage a somewhat greater or somewhat less sum than that which the parties have agreed between themselves; or because it finds that one or other of the parties have agreed beween themselves; or because it finds that one or other of the parties might, as matters have turned out, have made a more prudent bargain. *It not unfrequently happens either that the services involve more risk or difficulty than the salvor has forc-*

seen, or, on the other hand, that they prove more easy of execution than the master of the ship to be salved when making the bargain has supposed that they would be. But if they were such services as were fairly within the meaning of the contract, the mere circumstances that the ease, or risk, or duration has proved to be greater or less than was expected when the contract was made, affords no ground for the court's interference with it. 'It is no argument,' said Dr. Lushington in The True Blue, 'against the validity of the contract, that in the first instance it was entered into under the impression that the service would be light, but that, in consequence of a change of weather or other circumstances of that nature, it subsequently became more onerous. It is the very nature of agreements of this kind to fix a stated sum as compensation for a stated service, and the parties who enter into the engagement take the risk of any circumstances which may, in effect, alter the extent of the stipulated service.' "

In the case of the Elfrida, the salvors took the hazard of a change of weather, of gales and storms, of the vessel starting a leak or going further ashore, and many other contingencies which might have delayed or prevented the work within the stipulated period of twenty-one days. Even the Merritt Wrecking Company had spent many weeks in taking off a vessel on the Texas coast. Others had been taken off, or partly so, when bad weather coming on, they were again beached and several wholly lost, as the evidence in this case fully established; so that there was much that was conjectural as to the outcome of this enterprise.

Clarke expresses it well when he says: "I did not think I would be so lucky." (Tr., 44.)

The Elfrida, as compared with other vessels stranded upon a lee shore, was singularly fortunate and this agreement for a specific sum is not to be lightly set aside when salvors fully complied with

it, saved the vessel, and took all the risk of great loss and expense upon themselves.

Sir R. Phillimore gave expression to the rule of reason and justice which we invoke: "But I feel not less strongly the duty and expediency of not allowing a contract deliberately entered into between perfectly competent parties to be set aside by either of them *because the execution of it has turned out more difficult or more easy than was anticipated at the time of making the contract.*"

Ken. Civ. Salv., 214.

The Sir William Armstrong (E. D. Va.), 53 Fed., 145, called for the application of the principles relied on by us. The steamer, with a cargo of 5559 bales of cotton, stranded on the shoals twenty miles north of the Virginia capes, and sent for assistance to Norfolk, fifty miles away. The Merritt Wrecking Organization, who were well equipped, in response sent two barges, two wrecking steamers and three or four tugs. The Armstrong was in water seven feet deep at low tide, and several feet in the sand, witnesses varying from three to ten feet. She had once floated off by the use of her engines and sails, but had fallen back and grounded again. The Merritts took off the cotton on barges. Their work was greatly favored by the weather, which was fine almost beyond precedent. They twice heaved her off. She was aground eleven days.

Before the salvage service began, salvors and the master of the Armstrong entered into a contract by which it was agreed that salvors should have the use of the material belonging to the vessel and the aid of the crew, and should receive for compensation 25 per cent on dry cotton saved, 40 per cent on wet cotton and 20 per cent on the value of the steamer, when saved. Claimants contended that this agreement was inequitable and exorbitant. Judge Hughes, in disposing of this question, and refusing to impair the obligation of the contract, remarks:

"It is well settled text-book law that the master of a vessel in distress may bind the owner by a salvage agreement in the absence of the owner; that it is competent for salvors, instead of leaving the amount of their remuneration to be determined by a court, to agree with the master of a vessel in distress to render the required assistance for a specific sum; and that, if a salvage agreement be proved, the court will enforce it, *unless it be clearly inequitable; it being no answer to an agreement to say, on one hand, that it is too hard upon the salvors, or, on the other, that the salvage services were attended by less difficulty than was anticipated.* It is just as well settled, on the other hand, that a salvage contract may, as any other contract may, be set aside on the ground of duress, or fraud, or deception, or gross exorbitancy, or other reason that may be pronounced sufficient by a court of justice." * * * Three days after the date of the contract the master telegraphed to his owners in England, informing them that he had made the contract, describing its terms, and they did not object, nor was there any evidence that during the whole period of seventeen days when the work of salving the ship and cargo was going on, that the master made any objection. This vigorous expression occurs in the opinion: "If a solemn contract, made under the most serious circumstances, like the one under consideration, could be repudiated at pleasure by one of the parties to it, on such a ground as that insisted upon here, no contract could be relied upon as binding, and all the law of contracts, affecting so largely the affairs of mankind as that law does, would have to be treated as an idle jargon."

The G. W. Jones (S. D. N. Y.), 48 Fed., 925, furnishes another example. As the steamer was leaving the wharf at Progreso her anchor, on which she was heaving, broke, and a strong wind caused her to strand broadside upon the beach. Repeated efforts were at once made, by heaving upon the lines leading to the wharf, to pull her off the beach, but without success. Several ropes were broken.

The sea was choppy; the wind fresh, and it was near high water. "There was no danger of wrecking, unless a northerly storm should come up, but the master deemed it dangerous to leave the vessel in that condition over night, *lest she should work higher up on the beach and deeper in the sand.*" He made a written contract with the master of the tug, and the defense was that the captain of the steamer was compelled to sign it by duress and compulsion, and had no authority from the owners, and did not communicate with them, which he might easily have done. The evidence showed that the apprehension that she would go higher was justifiable. "It was his duty, therefore, to procure any aid at hand that could be reasonably procured for the immediate relief of the steamer. His authority as master to secure this at once, without communication with the owners, is plain. The circumstances did not admit of delay, nor is there any rule of the maritime law that would require the master to obtain special authority in order to secure relief of this kind in an emergency."

"The evidence does not justify the defense of duress or compulsion. *The master was not at sea, but in port,* and had the option of procuring any different kind of relief that Progreso afforded. The tug was maintained there by special service, but this circumstance worked no constraint upon the steamer. * * * She (the tug) received no injury, however, and the steamer was got off without receiving any damage, whatever, and sailed for Boston the second day afterwards. I can not attach much weight to the evidence of the witnesses at Progreso that the steamer was not in peril. *Doubtless she was not in immediate peril of being wrecked, but the witnesses do not say that it was not perilous to leave her on the beach in her stranded condition, without attempting immediate relief.*" The contract was sustained.

Such contracts as the one now before the court have been sanctioned and upheld in this circuit. Where the parties are *sui juris,*

and there is no grossly disproportionate recompense, in the light of all the facts and probabilities, the court will require ship owners as well as others to observe the solemn agreements made by them or their representatives.

The R. D. Bibber, 33 Fed., 55, a schooner loaded with railroad iron, went ashore in Galveston bay. A contract for salvage for 50 per cent of the value was made. Wrecking crews and large pumps were used, and there was risk of serious damage to the property engaged in the work. The court held that the evidence did not warrant any finding that the Lighter Company acted otherwise than in good faith, or took any undue advantage of the master of the Bibber. What the company did was open, and the master could see for himself, and the contract was enforced.

In the case of the Hesper, 18 Fed., 692, so much relied on by claimants, there was no contract. It did not appear that the Hesper was so near a lee shore. There was no hazard to the persons or vessels aiding her to get safely off. There was some in our case, as will be shown. It did not appear that she was sunk in the sand. The salvage allowed was not upon a contract, and we submit that the best reason and authority require the maintenance of these contracts when not shown to be unconscionable, or obtained by fraud or duress.

The principle we invoke was applied *e converso* in Bondies v. Sherwood, 22 How., 214. There the libellants agreed to raise a sunken vessel in fourteen days, but it took them longer. The court held that by their own showing they could not recover under the contract, as they did not carry it out within the time stipulated, and further, that they could not, in repudiation of the agreement, libel the vessel for salvage. In other words, the court held them to their contract and refused to make a new one for them.

Harley v. 467 Bars Railroad Iron, 1 Saw., 2, announces the rule in this language:

"Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreements if fairly made and no advantage be taken of ignorance and distress, are readily upheld by the courts."

The court further remarks that in an undertaking of this kind much is conjectural and salvors necessarily take chances.

Justice Story, who went as far as any one in the scrutiny of salvage contracts, thoughtfully observes:

"The situation of the parties, the nature of the service and the absence of all controlling necessities requiring immediate relief on one side, at any expense and hazard, in order to escape from impending perils and calamities; and, on the other side, the absence of any duty to lend the required assistance, or any motive to take advantage of the necessities and urgencies of those perils and calamities to drive a hard and unconscionable bargain, make it a case where the court not only looks with indulgence upon such a contract, *but endeavors to fortify itself against the exercise of mere discretion* by adopting and enforcing such a contract as equally just, moral and conscientious." (Bearse v. 340 Pigs of Copper, 1 Story, 323.)

In the H. D. Bacon, 1 Newberry's Adm., 279, it was well said that if the compensation agreed upon must be proved to be just and reasonable, the same proof would insure a recovery for the same amount without any contract, and it need not be proven that no advantage was taken of the situation.

"The true principle by which such cases should be governed would appear to this court, with great respect for others, to be that established in like cases in courts of equity, that is, that a contract should be presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would refuse to enforce it."

In the H. D. Bacon, libellants agreed, with a diving bell, to

raise a sunken steamboat of the value of about $20,000. The master promised to pay $4000, but the owners resisted the claim upon the grounds that the boat could have been raised without the aid of the bell, but not in so short a time (twelve hours), and that the charge was unreasonable and unjust.

The court upheld and enforced the contract.

The Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, applied the rule to the salvor, who, deeming the agreed compensation inadequate, sued for more and set up his mistake of fact and inadequacy of the amount for the labor, skill and money expended by him. The court found that it was no doubt a hard bargain for libellant, but that it would not be set aside for that cause alone. *That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way.* On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

The True Blue, 2 W. Rob., 176, was a case very much like the present, except that in that case the expense was largely increased by a storm having come on, and yet the contract was enforced, although the disparity was great. * * * "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

A very just and reasonable view of a kindred question is thus expressed by Ware J. in the Centurion, Ware, 481:

"It does not appear that this business of saving the wreck was attended with any peculiar danger, but this was solely owing to the favorable state of the weather. Had the weather changed and become tempestuous, the peril might have been very great, not only

to the salvor's vessel, but to all who were engaged in the enterprise. This was a risk which the salvors took upon themselves."

The vessel saved was stranded upon a sandbank twenty miles from Cardenas, Cuba. The salvor, with the aid of her crew, took out part of her cargo and then towed her off to Mantanzas. They were awarded by arbiters one-third of the net proceeds of the cargo, and one-half of those of the vessel, and the finding was not disturbed.

2 Parsons Ship. & Adm., 306, note 2, after citing several American and English cases, declares: "What we consider to be the true rule is stated in the case of Eads v. The Steamboat H. D. Bacon, 1 Newb. Adm., 274, 280, 'that a contract should be presumed *prima facie* to be fair; but if proven to be unconscionable the court of admiralty, like the court of equity, would refuse to enforce it." In the Helen & George, Swaby Adm., 368, Dr. Lushington said: "This case turns upon the effect of the agreement, which was certainly made by the master. It was truly contended by Dr. Jenner that such agreements will generally be enforced by the court. The principle upon which the court acts is, that if satisfied that an agreement has been made, it will carry it into effect, *unless totally contrary to justice and the equity of the case;* but the owner of the ship, against whom the agreement is attempted to be enforced, may show that it was improperly obtained. The owner may contend that, under the circumstances, the sum of money was grossly exorbitant; and *a fortiori* if he can show that the agreement was obtained by fraud or compulsion, no court would hold it to be binding. But when the execution of such an instrument is once proved, it is *prima facie* binding, and the burden of proof falls on those who dispute the validity of the instrument."

The Wellington (48 Fed., 475) was towed about 544 miles in four days, for which she agreed to pay $15,000, and the agreement was enforced. The court says: "I can not see any just

grounds for holding that the master of the Wellington, in making the contract in question, acted under compulsion or duress, or that any advantage was taken of his unfortunate position by the master of the Montserrat. Nothing could have been fairer than the offer of the Montserrat to perform the services and let the compensation therefor be fixed on arrival in San Francisco by the owners of the Wellington; yet that offer was refused by the master of the Wellington, who, for some reason not apparent, wanted the amount to be fixed in advance. There was no compulsion about the case for the reason that the salvor, as just stated, offered to render the service without any contract at all, which offer was refused by the master of the Wellington. This fact is of itself sufficient to dispose of that objection to the contract made. * * * *The amount was undoubtedly too large for the services, but I do not think it so exorbitant as to justify the court in setting aside the contract thus made.*"

"If the amount agreed upon exceeds somewhat the accustomed measure of a liberal reward, it will not be disturbed if deliberately and understandingly assented to, without the judgment of the promising party being overborne by the distress in which he is placed."

There are no two cases precisely alike, and no absolute standard can be found. The analogies of precedents illustrate the general principle, a fair and reasonable application of which to the facts of the case in hand will aid us in reaching a substantially correct judgment.

Two recent cases which we consider as strongly supporting our general contention that the compensation was not grossly excessive or unreasonable are:

The Lamington (C. C. A. 2d Cir.), 86 Fed., 675.

The Haxby (C. C. A., 4th Cir.), 83 Fed., 715.

II.

WAS THE AMOUNT AGREED TO BE PAID SO EXCESSIVE AS TO BE UNREASONABLE AND INEQUITABLE?

That it is more than a court of admiralty might have allowed in the absence of a contract may be conceded. When the ship first stranded, Clarke offered to undertake the task for such award as the court might decree, but this Burgess refused, for the reason, among others, that the service might be unduly prolonged and he, therefore, called for proposals and received at least two.

But, would a court of admiralty have materially lessened the recompense and the bounty, both of which are essential elements of salvage, in view of the restriction placed upon the salvor requiring him to fully succeed within twenty-one days or lose all the time, expense and labor he had ventured?

A court would make an award still more liberal when it is shown that the salvor assumes a serious risk, as Clarke & Co., did, in undertaking to save the vessel within a short specified period. Again, with reference to the probable as well as the actual conditions, instead of being delayed one day in working at sea with his plant and anchors, because of rough weather, Clarke might have been delayed many days, but for the unusually favorable winds and tides and weather, in heaving the ship out of her bed and dragging her a thousand or twelve hundred feet. His work, as that of other salvage on this coast, was subject to interruption from winds, seas, break downs and all the vicissitudes of the equinoctial season upon a lee shore, so that it is difficult to perceive that a court of admiralty, having regard to both present and potential conditions, would have decreed so low an amount as did the Court of Circuit Appeals, even had there been no contract deliberately entered into and with full knowledge on the part of owners, as

well as of the master, of all the circumstances and probabilities. It has been the history of all ships that have gone ashore on the gulf coast and very probably elsewhere, that the longer they remain out of their element the more difficult, expensive and uncertain it is to rescue them, and so, when several days had passed, libellants had the right to ask such terms as the probably increasing risk and cost fairly seemed to justify. The utmost good faith characterized all their conduct. The charges of fraud and bad faith were wholly unsustained. The overwhelming weight of the evidence is that the ship was being embanked, the banks varying with winds and currents. The very place has, since that time, owing to the action of the currents upon the jetties, shoaled to two feet. (Johnson, 119.)

As Judge Boarman said in the Guadalupe, 20 Fed., 445: "In reply to the suggestion made by respondents that the Guadalupe was not in peril when the tugs came to her, it may be remarked that the true element of the ship is in the sea, and her life is only full and complete when she is riding in deep soundings, at anchor, or when she can respond and move at her master's will on the ocean in pursuit of her useful purposes. And when such a ship, at a time marginal to the equinoctial period (Sept. 24), is found in the shoal water of the Mexican gulf, with the full length of her flattened bottom pressed by her great weight into the sand, unable, by the application of all her great power, supplemented by favorable tides and winds for seventeen hours to move herself, it can not be said that she is free from serious distress, though the sea and the conditions about her may give no perceptible evidence of immediate peril. The proof shows that she did not and could not, with favoring tides and winds, move herself for seventeen hours; and under such circumstances the conclusion can not be avoided that she was in distress, and that the peril attending such a ship was much more than a possible danger.'

The opinion in that case comments upon the speculations of the captain in his depositions, which are at variance with the record of the log, just as in our case, and the clear and admirable reasoning in that opinion can not be answered.

There may be a few cases found in which courts have reduced the amount of the contract price, but the circumstances were extraordinary and generally tainted with fraud.

Burgess had the benefit of the disinterested advice of the insurance agent, masters of vessels, pilots and residents, and they all concurred with the views which the master then held and expressed, and which were based upon his own experience of thirteen and one-half years and his knowledge of this and similar coasts where the sand formed banks around vessels.

How does the consideration compare with the value of the property saved?

The master (216) puts the Elfrida's value at £22,000. She was insured for £18,000. The estimate of one of her owners that she was not worth as much as her insurance discredits itself. (See first part of brief, where value is fully discussed.)

III.

WAS ANY UNDUE ADVANTAGE TAKEN OF THE MASTER?

If so, the record does not disclose it. No one sought to persuade him: from the 10th, when Clarke left, until the 15th, when he returned, no one in Clarke's interest talked with him. He told Morrissey that he was communicating with the Merritts, a large wrecking concern. The latter told him to do nothing without consulting his owners, and all the witnesses who spoke to him practically confirmed Mr. Sorley's advice; but it will be sufficient to rest this part of the case upon the master's own testimony. He

says he did consult with the pilots, Lloyds' and others, and that his judgment accorded with theirs as to the acceptance of Clarke's tender, and that no one misrepresented any fact to him. (215-210.) Clarke's opinion that sand banks might form, *expressed after the contract was agreed on and not an inducement thereto*, was the same as the captain's and that of every other witness who testified upon the subject. In fact, it had formed to the depth of two feet. (89.) Burgess (243.) At the stern the most (243.) The charge of undue advantage is a reflection upon several good people, in no way interested in this contract, upon the dead, as well as the living, and without color or foundation, and due solely to an attempt to escape, by any means, from what now is claimed to be a bad bargain after its benefits have been received.

Let us ask if claimants, after receiving the master's letter of October 7, which in due course of mail would have reached them on October 16, one day before the vessel was salved, thought the compensation excessive, why did they not at once take other steps, through Lloyds' agent, the master, or independently of either. They could have arranged for salvage from New Orleans or Key West, if not from Galveston, not to speak of the resources of the wrecking organizations on the Atlantic coast. They can not stand by, under all the principles of equitable estoppel, and permit the work to be done under the contract with full knowledge of all the circumstances, and without dissent, and then successfully ignore it. The old principle of right and equity here applies that having remained silent when they should have spoken, they must not now be heard to speak, when they ought to remain silent.

IV.

WAS THE VESSEL IN DANGER OF LOSS OR SERIOUS INJURY?

In addition to the testimony of the pilot, Coveney, of the master

and others already given, we will briefly summarize the record as to the actual and probable peril of the vessel. Coveney shows that if an equinoctial gale, which was to be expected in September and October, had come up, she would have become a total loss. That in going on the beach she lost two kedge anchors and a bow anchor. (89-90.)

F. Johnson, a pilot on the Brazos bar, says that she was in five feet of water, and in danger of going up higher and broaching, in which case her rudder might have been broken and she otherwise disabled, and the expense of getting her off doubled. That the sand banked under different parts of the vessel according to the currents, and that this would strain her and be apt to start her plates, when she would bilge and the sand get into her. That would be the effect of the southeast winds. The storm winds come from east to northeast and go around to the south, and could reasonably be anticipated in October. (115-116.)

The Elfrida, as shown by the rough sketch made by her captain (322), was entirely exposed to the winds from the southeast and around to the west. The jetty to the eastward was for 2000 feet under water and at the shore end only about two feet above water. In fact, a northeast wind drove her ashore. (219.) The record of previous years showed that the October winds sometimes reached a velocity of sixty miles per hour. (146.) The sands shifted with the tides. (52.) On the day she was beached the Weather Bureau advised a tropical hurricane for Port Eads, but Velasco proved not to be in its course. When first ashore the prospect of getting her off was favorable, but after the high wind of the 10th she was firmly imbedded. In fact, must have gotten higher up. (65.)

A. D. Smith, a pilot on Galveston bar, and for twenty years familiar with the coast and the results of vessels stranding, testified that he considered the Elfrida's situation very serious. It could

not become better and it might become worse and become a total wreck. Stormy weather would at least damage her and stop work, and might prevent her being taken off at all, which had occurred in other instances. The bark William was gotten off and drifted back and became a total loss. She was of 1200 tons. The chances are the Elfrida would have washed upon the beach and not be worth taking off, if she did not work down into the quicksand.

The Francisca, a large iron steamer, worked into the quicksand on Galveston bar. She was ashore twelve days, and had a good deal of water and sand, and was seriously damaged. In a storm the chances were that the Elfrida would go higher on the beach. The gales of wind we have go around from the east southward and end in the northwest. The jetty would be no protection from the southeast wind. (92 to 106.)

Wm. Scrimgeour, with an experience of twenty-four years on this coast as mariner and pilot, stated that a big tide and gale would bring the Elfrida higher on the beach, and in doing that she would likely get to leaking and sink in the sand. (92.) October is the windy month. (92.) With the current running at all the sand banks up on the side the eddy is on. (92.) The Alabama, an iron steamer of 400 tons, went ashore and was badly damaged. Her back broken nearly in two. (93.) The Australia, an iron steamer of 2000 tons, was taken off by the Merritt Wrecking Company after much delay. (93.)

William A. Hutchings, Superintendent of the Life Saving Service, mentioned a great many vessels that were stranded on the gulf coast, some of which were wholly lost and others much injured. (96.) Among them was the iron propellor Aransas of 900 tons. In a heavy southeast wind the Elfrida was in a precarious condition, liable to be bilged by heaving up and down and filling with sand. When that occurred she would settle rapidly. "Placing myself as captain of the vessel, I would be in grave ap-

prehension as soon as she struck, and would use every means to get her off as soon as possible. I believe that every minute a vessel lies on this beach enhances the danger. There is no time to delay. Even an ordinary fresh breeze causes a good surf on this beach." One at twenty miles an hour causes a wave action that would break up a vessel, or drive it higher on shore. (97.) If she should rise and fall and strike the ground "the concussion would have a tendency to start her rivets and start her to leaking." (98.) The sand was likely to form. It is very movable in these waters. (98.)

Hauling off with anchors is the safest and surest way. (102.) The surf, in nine feet of water, or seven in a gale, breaks very viciously. A vessel goes gradually shoreward and makes a bed for herself. (103.) The jetty did not protect against southeast wind. (103.)

To the same effect was the testimony of James McDonald, who had been a pilot for twenty-one years, and who knew every part of the Texas coast. (106.)

We are likely to have hurricanes in October. (107.) He told of a number of vessels that had been wrecked, and some of them lost on this coast. The bark Houston was lost. The Reindeer, an iron steamer, also. (110.) The sands were shifting. (112.)

Robert Ross, also familiar with the coast, explained the position of the Elfrida, and that she was likely to start to leak by pounding and starting her rivets, when she would sand up and probably be a total loss. (122.)

An iron steamer, the Alabama, within his knowledge, had gone ashore, and when taken off after the lapse of over two months her back was broken. (124.)

J. Anderson: The jetties were not any protection at all. When the sea breaks in at all it comes stright in there. (125.)

The Merritt Company took off the iron steamer Australia, for

which they received $60,000. It took them three weeks to get here and *nine weeks* to do to the work. (Moller, 139.)

The log of the steamer of the 18th described the vessel's winches, windlass, cables and ropes as badly strained and damaged. Two anchors, wire, rope and cable lost. (220.) Steamer's steering gear badly strained, working badly, and pieces broken off of four blades of the propeller. Cement broken at various parts of bottoms of tanks. Bottom slightly indented. (221.)

The engineer's log showed that rudder and other valves were damaged and broken. Bilge pipe broken. (221.) Engines, steam windlass and winches strained heavily. Circulating valves split and ballast donkey strained in pumping through condenser. (223.)

Although the tide record at Galveston did not show quite as high a tide on October 17 as on other days while the ship was ashore, yet the tides were not necessarily the same at the mouth of the Brazos. Owing to the winds and distance they might be different at the two places. (Judson, 20.) A very high flood the day she was launched was shown by Coveney. (186, 89.)

V.

THE INQUIRY IS NOT WHAT THE COURT SHOULD HAVE AWARDED IN THE ABSENCE OF A SPECIFIC AGREEMENT, BUT WHETHER ANY SUFFICIENT REASONS HAVE BEEN ADVANCED TO JUSTIFY THE VIOLATION OF THAT AGREEMENT, AND TO HOLD IT TO HAVE BEEN UNREASONABLE AND UNCONSCIONABLE, UNDER ALL THE CIRCUMSTANCES.

Claimants, with much diligence and learning, argue below that if there had been no contract the award should have been less, and

they presented under subdivisions various ingredients of salvage service, apparently contending that to justify an allowance of twenty per cent or twenty-five per cent of the value saved all of these should concur. If they did, we would, under the decisions, be fairly entitled to about a moiety of the Elfrida, but as the argument of counsel was largely abstract, we will not discuss all his subdivisions.

To adopt the language of the Supreme Court in N. Y. H. Protection Co. v. The Clara, 90 U. S., 1, the elements necessary to constitute a valid salvage claim are:

"(1.) A marine peril to the property to be rescued. (2.) Voluntary service not owed to the property as a matter of duty. (3.) Success in saving the property, or some portion of it, from the impending peril."

It is not asserted that the lives of those on the Elfrida were in present jeopardy. If a severe storm had arisen they would have been, especially if they tried to reach the shore through the heavy surf.

We think it has been shown that the Elfrida's hazard was imminent, as well as prospective. Claimants' logic would deny the validity of such contracts unless the vessel were practically lost, and then there would be no property to be charged.

The value of the property saved, according to the captain, was about $110,000, and was insured for $90,000. While salvors encountered no extraordinary perils to persons or property, yet the tug made an unsuccessful effort to get alongside, but the wind was too strong (114), and, afterwards, when she did go to the stern of the Elfrida, towing the lighter and connecting the cables with the anchors, she thumped hard and was in danger of breaking to pieces. (117.) When first stranded Clarke came aboard when it was very rough. The witness was surprised that he should have come at all in such bad weather. (Johnson 116.)

Clarke became responsible for at least one of the lighters, and his own plant was at sea. As to the skill and conduct of the salvors, no criticism is suggested. In fact, there was no more competent or skillful salvor upon the coast than Clarke. Results demonstrate this.

The property used by him was of the value of about $40,000 (116.) Two tugs, two schooners, two barges, anchors, hawsers, etc., formed the outfit. It is true that only a few days in time was expended and the labor of about forty men. The actual removal of the vessel from the beach occupied only about four hours, but it will be remembered that this was not a service to be compensated according to the time and the force employed, but according to the results achieved. Salvors hauled upon the vessel a half or three-fourths of an hour, so her chief mate states, before she commenced to move, when "she came along with sudden jerks. There was a jerk and a stop and then another jerk." (226.)

The pilot says the start was mighty slow. "The sea was coming in and she was well in her bed and would come out by jerks of about an inch at a time." (85.) It is true that no explicit evidence of expense incurred in the performance of the salvage service was offered, but from the number of men and vessels and length of time employed, a fair idea of the reasonable expense may be derived. This, of course, would not include the neglect of other business.

We, in the beginning, reviewed the facts which led up to the contract and accompanied and followed its performance. They attest the good faith, fairness and value of the agreement, and the services which it called forth and induced, and the fact that "the end crowned the work."

VI.

THERE WAS A SUBSTANTIAL COMPLIANCE WITH THE CONTRACT, IN ALL ITS TERMS, AND ITS OBJECT WAS PROMPTLY AND SKILLFULLY ACCOMPLISHED BY LIBELLANTS.

Claimants insisted below that libellants' use of the winches, two anchors and cables of the vessel was such a departure from the contract as to annul it, and require a decree by the court of a greatly reduced award. This is not in accord with the language or true intent of the writing, and is untenable. It was stipulated that salvors should have the use of the crew and engine of the ship. Construing this with reference to the undertaking in hand, it is evident that the use of the crew necessarily implies the use of the appliances with which they work; otherwise there could be no use of the crew. A workman is useless without his tools. The engine is the complement of the crew, both meaning men and machinery, or such power and means as the vessel had to assist in her rescue. If the very strict notions of claimants prevail, the contract, in this respect, is meaningless. It must be read altogether, and steady regard be had for its purpose. The crew could not be used without the implements provided for them, nor would an engine be of avail without its boiler and connections. The reasonable rule, and therefore the right one, is that when authority is conferred for a particular purpose all incidental means necessary or proper to effectuate it are included in the grant, without express mention. But a steam winch or capstan is an engine. The evidence so describes it. In like cases, courts hold the singular number as collective.

Like observations, in the main, apply to the use of two of the ship's anchors and cables. The agreement provided for lightering the vessel, and the removal of the heavy anchors, weighing

down her bow, already fastened in the sand, certainly tended to aid in floating her. The fact that they were hauled on was obviously regarded by the parties as within the fair purview of the contract, but if not, it is now too late to object. The master, who spoke for and as the ship was silent then, when he should have objected, if he had the right to do so, and to allow such an evasion now would put it in the power of his principals to perpetrate a fraud. They are bound by his acquiescence. In fact, the practical contemporaneous construction of those who made the contract should, in the light of all the facts, control now as then.

VII.

THE AMOUNT DECREED IN THE TRIAL COURT WILL NOT BE REDUCED, EVEN WHEN THERE IS NO CONTRACT, UNLESS FOR CLEAR AND PALPABLE MISTAKE, OR GROSS OVER-ALLOWANCE, NONE OF WHICH EXISTED IN THIS CASE.

The Connemara, 108 U. S., 352, is one of the many authorities in support of the above doctrine. The Supreme Court took the view that as the lower court had most of the witnesses before it, it certainly was in a better position to judge of their credibility and weight than the appellate court could be, and if there was any fair evidence to sustain the decree it should stand.

Judge Bryant heard all the witnesses, except the owner, master and crew of the Elfrida, and of these the master was the most material, and his evidence in, perhaps, the most essential particulars corroborates that offered by libellants. The consentient mass of the testimony is most cogent in support of the fairness and reasonableness of the contract, and the exposure and peril of the vessel, and the fact that the contract was practically a land contract, made after much deliberation and without compul-

sion or deception of any kind. There is certainly abundant evidence to sustain the decree, which found specially that the *services were salvage services and should be compensated as such.* That the master was authorized to make the contract. That it was lawful, and entered into with full knowledge, or means of knowledge, of the master and of the owners of all the conditions then existing, and that the *amount named was not unreasonable under the said conditions.*

As Chief Justice Marshall in the Sybil, 4 Wheat., 98, said: "It is almost impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed."

Appellate courts are reluctant to disturb an award for salvage on the ground that the subordinate court gave too much, unless they are clearly satisfied that it made an exorbitant estimate of their services.

The Comanche, 8 Wall., 448.

The Circuit Court of Appeals for the Fifth Circuit, in the recent case of Compagnie Commerciale v. Steamship Company, 60 Fed., 921, allowed for towage of a steamer that had broken her propeller shaft while on her way from Tampico to New Orleans, $18,716. The towing vessel was delayed two days. The vessel towed had sails, rudder and steering gear in perfect condition.

This court should not alter the decree for the reason that the amount awarded may appear to it to be too large, unless the excess is so great that upon any reasonable view of the facts found the award can not be justified by the rules of law applicable to the case.

P. S. Co. v. Salvage Co., 123 U. S., 40.

The Hope, 10 Pet., 108, is a leading case upon this subject.

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evi-

dence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, will not be reversed unless it clearly appears that the decision is against the evidence." This is the exact language used in The Alijandro (C. C. A., 9 Cir.), 56 Fed., 624.

In the Albany (C. C. Dist., Mass.), 48 Fed., 565, it is said that the decision of the district judge, where questions of fact depend upon conflicting testimony, who has had the opportunity of seeing the witnesses and judging from their appearance, should not be reversed, unless it clearly appears that the decision was against the weight of the evidence.

In the case at bar all of the witnesses took the stand in person, except the master of the Elfrida and several members of the ship's company, and Thomas Bell, one of the claimants, and their evidence does not materially modify that given before Judge Bryant by the other witnesses. The master was examined by counsel before a commissioner on three different occasions. His evidence and that of his crew confirm in all important particulars the testimony offered by us. Claimants also offered and thus vouched for the pilot who was in charge of the Elfrida when she stranded and for three days afterwards, and his evidence, as well as that of the other witnesses, is convincing and undisputed as to the perilous position of the Elfrida, the harm, impending and prospective, and the necessity and value of prompt measures for her rescue.

There are two instructive cases decided by the Circuit Courts of Appeal of the Second and Fourth Circuits, respectively, viz.: The Lamington, 86 Fed., 675, and the Haxby, 83 Fed., 715, which awarded salvage of one-half and one-sixth in the absence of a contract.

The Haxby very strongly resembles the case at bar in the nature and duration of the services, the value of the property and other features.

Appended to the Lamington are extensive notes prepared by Judge Lacombe which epitomizes several cases where the validity of salvage agreements was in question, nearly all of which we have cited.

See also the North Erin (E. D. N. Y.), 71 Fed., 430, where the court allowed a tug $10,000 for going eighty miles and pulling off shore a steamer worth, with cargo, $100,000, the weather being favorable. This was without a contract.

In the Kenilworth (N. D. Cal.), 41 Fed., 523, the allowance, without a contract, for salving $100,000, was 14½ per cent.

VIII.

THE BURDEN OF PROOF, UNDER THE DECISION IN THE AGNES I. GRACE, *SUP.*, AND OTHER CASES, WHICH WE HAVE CITED, WAS UPON APPELLANTS.

IX.

THE CHARGES OF COLLUSION BETWEEN COMPETING SALVORS IS REFUTED BY THE EVIDENCE, AND CAN NOT AFFECT THE NATURE AND VALUE OF THE SERVICES, OR THE MERITS OF THE CONTRACT.

We have collated the evidence showing that it was extremely improbable that the master solicited a second bid from Brock. He, for the first time, claims that he did in his *third* deposition. The internal evidence of his error consists in the fact that in the absence of Clarke Burgess telegraphed to Moller to send someone else at the same price. If Brock had joined with Clarke he would not have run the risk of the contract going to a third person, and, when Clarke was delayed, would have himself offered to have

done it at the same price, or perhaps less, and while he was getting ready to do the work Clarke would have had time to come. It is not shown that Brock knew that the master's authority to accept Clarke's bid was qualified. Bearing in mind that Brock is dead, and the indefiniteness of the master's testimony, in this respect, its rejection in this particular was justified. Obviously, the trial court did not give it credence.

The fact that Brock undertook to notify Clarke of the movements of the vessel, so that she could be seized if the contract was not complied with, is proof only of a just and friendly spirit. Brock did no more than any one else would have done under the same conditions. He had been working for Clarke, and it was no evidence of a conspiracy that he should acquaint Clarke with the situation so that the ship would not run away before the debt was paid or secured. It is true, also, that Clarke owed Brock for his services and the hire of his barge.

The party alleging collusion should prove it.

J. Moller, the charterer, was betraying no duty in asking Clarke not to precipitate litigation, and in assuring him that he would let him know before the vessel sailed. This was the right thing for him to have done, and when Clarke wired requesting him to ask counsel to proceed against the Elfrida, he bore no such relation to the vessel as forbade his compliance with the request. Neither the interest of the ship, nor his duty as a charterer, were affected or violated by what he did; but, be that as it may, the question still recurs to the contract, and, if it was fairly entered into, and was not grossly unjust and oppressive, then it should stand, whether there was any competition among salvors or not. The proof, however, conclusively shows such competition.

Before leaving this subject we again refer to claimants' pretense that Lloyds' agent, Mr. Sorley, was not physically or mentally

capable of performing his duties. Yet he was on the stranded vessel two days.

James McDonald and others testify that he had been Lloyds' agent for a great many years, and in marine matters was regarded as the highest authority in Galveston. While he was old and feeble, his mind was clear and active. He was a man of superior intelligence and acquirements. McDonald says, and the other witnesses who knew him all corroborate him, "If he (Sorley) was not an honest man there was not one in Texas." His judgment was not impaired by his age and experience. (109-110.) He was a great expert in maritime adjustments, insurance and like questions. (Moller, 134.)

Mr. Sorley and Captain Brock were not living when the cause was tried.

The statement by Clarke of his opinion that there was danger of a sand bank forming about the ship was made after the master was directed by the owners to accept his bid, and seemed to have been Clarke's argument against a reduction of the bid. It could not have influenced Burgess three days before and it is elementary that expressions of opinion, forecast or expectation, that are, in substance, merely matters of inference can not be made the subject of false representation.

Gordon v. Butler, 105 U. S., 553.

Green v. Societe, etc. (C. C. R. I.), 81 Fed., 71.

X.

BRIEF GENERAL REVIEW.

As it has required considerable space to present the facts and the law with care and detail, we have thought it well to offer in conclusion a summing up of the principal points in the case, of fact as well as of law.

1. Libellants proceeded against the steamship Elfrida to enforce a contract made October 15, 1894, between the steamer, acting through her master, and ~~applicants~~ libellants, by the terms of which they undertook to float and place in a safe anchorage the Elfrida, then stranded west of the jetty at the mouth of the Brazos river, on the coast of Texas; to furnish all labor and material therefor at their cost, including a diver and necessary apparatus to survey said vessel, and to complete the work within twenty-one days, for which, if successful, they were to receive $22,000.00. The master, however, reserved the right to abandon the ship in favor of libellants in lieu of the $22,000.00, if he so desired. Should the libellants fail to float and place her in a position of safety within the twenty-one days, they were not to be paid anything. The use of the crew and engines of the steamer were placed at the disposal of ~~applicants~~ libellants. The Elfrida had been driven up on the beach a distance of one thousand feet from water of sufficient depth to float her. She drew eleven feet, ten inches, and was imbedded in the sand about six feet at the bow and four feet at the stern. Her draught, after pumping out water ballast, was nine feet. A strong wind and sea had forced her over the jetty on October 6, 1894. On the next day a cable, a chain and wire rope attached to the anchors, which had been let go, broke, and, with the anchors, were lost, and so she was driven further up on the beach. The two following days the sea was smooth and the wind light. On October 10th a strong southerly gale and a high sea caused her to bump and strain heavily. The weather continued bad until the 13th, when it moderated; on the 14th and 15th a strong southeast gale and very high sea prevailed, but the ship was fast imbedded in the sand and did not strike. On the 16th the weather was again fair, and on the 17th it was very fine, with a very high tide. On this day the vessel was taken off by libellants, who had been several days in securing and equipping the necessary vessels and plant for that

purpose. The master had previously ineffectually attempted to move her with the aid of her own anchors, cable, gear and a tug-boat, but had failed, losing his anchors and straining the ship's appliances. She was helpless for eight days before the contract was made. From the time she went ashore, the master was in communication with the agent of the ship at Galveston, who also had a representative upon the ground, and with Lloyds' agent, in the interest of the underwriters, who was on the vessel two days after it stranded, and by cable with her owners. Before he made the contract, the master acquainted himself with the conditions, he knew that the ship would be seriously damaged or lost in the ordinary course, unless promptly rescued, and endeavored to make arrangements for her salvage with the lighter company at Galveston, but failed to agree with them. He also sought information and advice from the pilots at Velasco and the masters of other vessels in that port, and after the fullest inquiry, and after refusing an offer made by libellants to undertake the floating of the ship for such compensation as the United States Court might award, he concluded to solicit bids. The ship's and Lloyds' agents concurred in this course.

In response, he received two proposals, one offering to do the work for $24,000, the other for $22,000. He cabled the lowest to his owners and was instructed to accept it, if lower impossible. "*No cure, no pay.*" This instruction was given after Lloyds' agent had been communicated with by Lloyds' while he was at Velasco, and had advised acceptance of libellants' tender.

Under this authority he entered into the contract with libellants. At that time, according to the evidence and without conflict, all parties thought the matter of floating the ship would be a difficult and tedious task, necessarily taking time, and uncertain as to the result. That the master and owners so believed is shown by the fact that they required the contractors to do the work in twenty-

one days, and stipulated for the option to abandon the ship in lieu of paying the compensation agreed upon, and that the contractors so believed is shown by their extensive preparations. They hired a large force of men, between thirty and forty, procured nearly a month's supplies, cables, chains, anchors, two tug boats, two lighters and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their equipments were hired. For one of the lighters they agreed to pay $6500 if she should be lost. All this property, worth about $50,000, was exposed to risk of loss or damage in the breakers, or by contact with the jetties upon which the Elfrida struck. One of the tugs struck and pounded heavily in going to the Elfrida with cables. They were engaged about five days in preparations and work, and by means of their appliances, skill and experience, with very favorable weather and high tides, the Elfrida was floated. The means used was by planting heavy anchors in deep water, with the aid of a tug and barges, from which cables and lines were carried to the vessel and heaved on with her winches and the steamer thus gradually worked from the bed in which she laid, and pulled about one thousand feet until she was afloat. She was worth, according to the evidence, from $90,000 to $110,000. She was insured for the former sum. The only defense made, so far as the evidence discloses, is that the compensation contracted for was excessive, because of the signal success of the salvors within the short time employed. There was absolutely no proof of any fraud or bad faith on the part of salvors in making the contract.

The amount agreed upon was 25 per cent, or less, according to whether the insured or master's value is taken, of the value of the property saved, and was a moderate, if not low compensation, from the outlook before and at the time the contract was made, and, in view of all the facts, was not excessive or unreasonable, and should be paid.

2. The right to agree upon compensation for salvage service, if not practically denied by the opinion of the majority of the Circuit Court of Appeals, is so restricted by it as to discredit and discourage such agreements and thus impair their efficacy. It not only invites litigation, but puts it in the power of either party to such contract, however fairly entered into, to be relieved of its obligation, if, in view of the time spent and efforts employed in accomplishing the result, the recompense, after the vessel has been rescued, is deemed either too onerous or too inadequate, whatever may have been the conditions and the probabilities before and at the time of making and carrying out the agreement.

A careful scrutiny of the evidence reveals the main, if not the only, contention upon the part of the vessel to be that, considering the time, expense and labor necessary to save the steamer, too large a proportion of her value had been agreed to be paid. This is not the test, but the real and only question is, or should be, was the bargain fairly made, or did the salvor impose upon, or take advantage of the situation of the master and the vessel to extort an unreasonable compensation?

The Circuit Court of Appeals should not have considered this case as if it were a question of salvage alone, but should have determined whether or not the contract was freely and voluntarily made after ample opportunity for inquiry and deliberation, and whether or not the amount agreed to be paid was grossly disproportionate to the value of the property saved, keeping in view the facts present and probable, as well as the contingency that the contractors could have lost three weeks' time, with the expense and labor incident thereto, and have reaped no reward, if unsuccessful in taking the vessel off, although they might have moved her to within a few feet of deep water.

The master says: "I wired them (the owners) that there was every probability of a bank forming around the ship, which was

my opinion," (and was also that of every person who testified in the case, and the disinterested persons whom the master consulted.) He further swore that the salvors had two tugs and two lighters; that where she was grounded was six feet deep at the stem and eight feet at the stern, and by pumping out the water ballast her lowest draught would still have been nine feet. In other words, with the ballast out she would have still been three feet in the sand at the bow and one at the stern.

3. The facts fully sustain the fairness and validity of the contract, and the absence of any improper pressure or undue influence from any source. The services consisted of the successful removal of the steamer from the beach where she had been stranded for ten days. The contract was made in writing a week after she went ashore. She had at first struck and pounded upon the bottom, but, her cable parting, had been driven further up and had settled or become embanked in the sand, and so remained until taken off by ~~appellants~~ Williams. She drew over nine feet. The depth where she lay was several feet less, varying with the tides.

As to the perilous condition of the vessel, her log is probably the most reliable and the best testimony, but the Court of Appeals seems not to have considered it. (246-7.) This shows the variations in wind and weather. A strong wind and sea having driven the ship over the jetties on October 6, on the 7th her cable chain and wire rope parted and with their anchors were lost and she was driven further on the beach. On the 8th and 9th the wind was light and the sea smooth. On the 10th a strong southerly gale and high sea caused the ship to bump and strain heavily. This weather continued until the 13th, when it moderated, but on the 14th and 15th we find this entry: "Very strong S. E. gale and very high sea. Ship fast on the ground." On the 16th the weather moderated

and on the 17th was very fine, and on the latter day the vessel was pulled off after several days' preparation. We ask the court to review this log.

It will be borne in mind that the reckless charges of fraud and undue influence that were made by ~~appellants~~ claimants were utterly overthrown by the proof.

Insufficient importance seems to have been attached to the master's testimony, where it is shown that the pilots, underwriters' agent and others, all concurred in regarding the vessel's situation as perilous. The court say that the evidence showed that no iron steamer had been lost on that coast. McDonald testified to at least one total loss, and others to vessels having been broken up.

Where the vessel stranded there was at the time of trial only two feet of water, the sand having banked up. The weather record shows that the wind attained a velocity of as high as thirty-three miles per hour during the time that the vessel was ashore.

There had been full inquiry and careful deliberation on the part of her master as to the best course to be pursued for several days after the stranding. He thoroughly understood the situation, her exposure to the storms of the gulf, and the great probability, next to certainty, that she would, in the heavy weather which was to be expected at any time in October, be either wholly wrecked, or greatly lessened in value by breaking up, or becoming still more deeply imbedded in the sand, one of which results would have inevitably ensued, according to the history of similar wrecks upon the shores of the gulf. He communicated with his owners by cable during this period and had their approval of the contract. He also sought the advice of the charterers, of the pilots of the port, and of masters of other vessels, whose views agreed with his, and the contract was also with the full approval of Lloyds' agent, who represented the insurance companies. After the fullest investigation, he acted upon his own judgment in engaging libellants to

take off his vessel, which conclusion was sustained by all the facts, as well as by the disinterested information and advice of those with whom he had conferred.

4. Upon these undisputed facts a question of far-reaching importance and gravity arises, affecting the right of freedom of contract, and, as a consequence, valuable maritime interests. Are contracts made upon land, for the relief of stranded vessels, with full knowledge of existing conditions and after many days' delay, subject to the same rules as salvage contracts made at sea by ships in distress without time for deliberation or opportunity to seek other assistance? If the same rules are applicable to both, then were the circumstances attending the making of this contract, as well as those preceding and following it, such as to destroy its validity, and to authorize the substitution of the idea of a majority of the Court of Appeals as to what is a proper compensation for the solemn agreement of the parties themselves, fairly entered into, without compulsion, overreaching or bad faith of any kind? Upon the other hand, should not parties in such cases as this "understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere?"

5. A brief outline of the facts proven has been given in order that this court may perceive the necessity of correcting the judgment of the Circuit Court of Appeals, which reversed that of the trial court. The latter had the witnesses before it, heard them testify, and, after a full and painstaking consideration of the evidence, argument and authorities, on October 29, 1895, entered its decree, finding, among other things, that the services were rendered in saving the steamship under a contract in writing made

between libellants and her master, who was duly authorized to make the same. That it was a lawful contract and was entered into by the master of the steamship with the full knowledge, or means of knowledge, of the said master and of the owners of said steamship of all the conditions then existing, and that the amount named in the contract was not unreasonable, under the conditions.

The decree was, upon appeal by the Elfrida, substantially sustained as to all the findings above recited, except the last, and as to that a majority of the Circuit Court of Appeals held that the amount named was excessive, and reduced it from the sum contracted to be paid to $10,000.00. Circuit Judge Pardee dissented from this annulment of the contract in an opinion so lucid and strong as to justify, if it does not require, a thorough consideration by this tribunal of a case in which one of the ablest and most experienced admiralty judges in this country has arrived at an opposite conclusion from that reached by the two other members of the court.

6. The contract for salvage services and compensation should have been enforced, as it was shown, without conflict, that the salvor took no advantage whatever of his situation. The bargain made was not unreasonable. There was no evidence whatever of unfairness or bad faith on the part of the salvors, and the law of contracts is applicable to such agreements as this, at least to the extent of enforcing them in admiralty, where there has been a definite, distinct agreement, with ample time for the parties to consider what they were doing, and where the contract was considered by all at the time it was made to be fair and reasonable.

Post v. Jones, 19 How., 150.

The Agnes I. Grace, 2 U. S. App., 323; 51 Fed., 959.

Jones on Salvage, 99.

The conditions in this age are far removed from those prevailing in the fourteenth century, when the laws of Oleron were promulgated, cited in the majority opinion, and which were essentially directed to the prevention of piracy or extortion of agreements from small wooden vessels in distress upon the high seas, far from any relief, and completely at the mercy of the rescuer.

The just and enlightened rule is as stated in Harley v. 467 Bars R. R. Iron, 1 Sawyer, 2: "Parties may agree on the amount of salvage compensation, or on the principles upon which it shall be adjusted, and such agreement, *if fairly made and no advantage be taken of ignorance and distress, is readily upheld by the courts.*" As observed in that case, in an undertaking of this kind, much is conjectural and salvors necessarily take chances.

Was this agreement fairly made? The master upon shore was surrounded by his friends, and those whose interests were the vessel's interest, the ship's agents, the insurance agent, the pilots, in daily communication with his owners, and he himself testified that, if a storm came on, the vessel would be almost inevitably a total loss, having himself failed with anchors, tug boat and other appliances to get his ship off, and having badly strained her and lost a part of her equipment in so doing, the vessel daily settling in the sand, having applied to other sources of relief at hand, and having accepted the lowest offer, after having declined to submit the matter to the courts, being himself a mariner of thirteen years' experience and familiar with similar conditions; these facts, and, in fact, the entire record shows that the agreement was a fair and reasonable one and that no advantage of any kind was taken.

7. In such a case, as Judge Story remarked: "The court not only looks with indulgence upon such a contract, but endeavors to fortify itself against the exercise of mere discretion by adopting

and enforcing such a contract as equally just, moral and conscientious."

Bearse v. 340 Pigs of Copper, 1 Story, 323.

All such contracts are presumed *prima facie* to be fair, but if proven to be unconscionable, a court of admiralty, like a court of equity, would not enforce them.

In the Silver Spray (E. D. Mich.), 1 Brown's Adm., 349, the court found that although the bargain was a hard one for the libellant, that it would not be set aside for that cause alone. That he had ample time for consideration, and there was no pretense of any fraud or deception used towards him, or that he did not know the situation and the difficulties in the way. On page 354 the court says: "The contract appears to have been entered into openly and fairly in all respects, and there is no principle and authority upon which the court can disregard it, or make a new contract for the parties. It must be enforced as it stands."

As said in The True Blue, 2 W. Rob., 176, where the contract was enforced, although the disparity was great: "*Parties must understand that contracts fairly entered into will be strictly enforced in admiralty as well as elsewhere.*"

8. The case that we have stated is the substance of all the testimony, and there is no material conflict. The opinion of the majority of the Honorable Circuit Court of Appeals is mainly devoted to a consideration of the question as to what would be a proper and sufficient award of salvage in the first instance, independent of any agreement between the parties; in brief, the court treats the contract as nothing more than an indication of what the parties thought the work should or might be done for, but in no wise controlling. Even upon the basis of salvage, without an agreement

fixing compensation, Judge Speers seems to lose sight of the risk incurred by the salvors, and especially the risk of the time-limit of twenty-one days, but proceeds to declare, in effect, a new contract for the parties, such as they might have made had they known in advance the length of time and amount of effort it required, as shown by subsequent events. This is not the criterion. As we have remarked, *such a test applied to any contract in admiralty, or elsewhere, would, in the vast majority of cases, require a readjustment of the compensation.* This should not be determined by looking backward, but the court should, as near as may be, place itself in the position of the parties, and under the conditions and probabilities which existed at the time they formed the agreement. *Having done this, unless the amount agreed to be paid for a successful issue is so exorbitant as to shock the conscience, or to afford satisfactory evidence of fraud or duress, then the agreement should be enforced.*

Admiralty does not espouse as its wards the masters and owners of vessels who make their contracts upon land, with every facility for determining what course to pursue, and uninfluenced by the imminence of danger or distress, or absence of other means of rescue, such as confront a vessel wrecked upon an uninhabited coast or helpless upon the ocean.

The authorities reviewed in Judge Pardee's opinion vindicate its soundness, and we refer to that opinion as a part of this brief. It is a clear and true exposition of the facts of this case, and is in harmony with reason and the broadening spirit of modern jurisprudence and legislation, which, while according to individuals, the greatest latitude of conduct consistent with their duties as members of society, yet requires of them the discharge of their just obligations, and discountenances repudiation or paternalism, both of which are essentially involved in the defense.

The obligation of contracts, the freedom of this one from any taint of unfairness or compulsion, the hazard and exposure of the Elfrida, the risk, expense and success of libellants, all require the reinstatement and affirmance, in all things, of the decree of the District Court.

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